85-1894

No. .....

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1985

—o—

EVELYN FALKOWSKI,

*Petitioner,*

v.

UNITED STATES DEPARTMENT OF JUSTICE,

*Respondent.*

—o—

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

—o—

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## QUESTIONS PRESENTED

1. Whether the presumption against reviewability under APA § 701(a)(2) enunciated in *Heckler v. Chaney*, 470 U.S. —, 105 S. Ct. 1649, applies to a Department of Justice decision not to provide legal counsel to a federal manager sued personally and officially for actions taken when on the job.

2. Irrespective of the presumption regarding reviewability, whether there is "law to apply" with respect to review of a Department of Justice decision not to provide counsel to a federal manager sued for work on the job, when said decision was to be based upon the "interests of the United States" and expressly was based upon an impermissible consideration.

## PARTIES TO THE PROCEEDING

Evelyn Falkowski is the only petitioner and the United States Department of Justice is the only respondent.

The American Civil Liberties Union Fund of the National Capital area participated as amicus below. The Equal Employment Opportunity Commission, a defendant-appellee below, is not involved in the claim before this Court.

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UNITED STATES DEPARTMENT OF JUSTICE,

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

—o—

Evelyn Falkowski, by counsel, files this Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

—o—

## OPINIONS BELOW

The first Opinion of the Court of Appeals (APP. 1a-27a) is reported at 719 F. 2d 470. The *en banc* denial of

rehearing (APP. 35a-38a) is unreported. This Court granted certiorari (APP. 48a), 470 U.S. —, 105 S.Ct. 1860 (1985) and, without opinion, remanded this case for reconsideration in light of *Heckler v. Chaney*, 470 U. S. —, 105 S.Ct. 1649 (1985).

The Opinion below after remand (APP. 49a-55a) is reported at 764 F.2d 907 (D. C. Cir. 1985) and the Opinion upon Rehearing (APP. 56a-60a) is reported at 783 F. 2d 252 (1986). The Opinion of the District Court (APP. 28a-32a) is unreported.

## JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

## STATUTES AND REGULATIONS INVOLVED

Relevant provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq.*, as well as the statutes (28 U.S.C. §§ 516, 517, 519, and 5 U.S.C. § 3106) and regulations (28 C.F.R. §§ 50.15, 50.16) that govern the provision of government legal counsel for federal managers are reprinted in the Appendix attached hereto. This litigation also involves Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, *et seq.*, and 18 U.S.C. §§ 2511(2)(c) and (d).

## STATEMENT

Petitioner is a high-level federal employee who was sued as a co-defendant in her official and individual capacities for actions her agency certified as within the scope of her duties. Her agency had initially blamed her equally with the subordinate who sued her. She was denied access to counsel by government attorneys or at government expense in what appears to be the only known instance in which a federal manager has been denied government-supplied counsel when sued by a subordinate. Petitioner alleges impermissible and unlawful treatment by the Department of Justice and her employing agency, the Equal Employment Opportunity Commission.[1]

Petitioner has resisted rejection from what the Constitution and Congress provided will be an inclusive federal community. See *Constitutional Law and the Teaching of the Parables*, by Robert A. Burt, the Yale Law Journal, Vol. 93, No. 3, 1984 pps. 464-476.

Although the Department of Justice has allegedly penalized her unfairly, and next time could penalize someone else unfairly, it claims unfettered discretion to decide which government managers sued officially shall be provided with legal counsel.

Ms. Falkowski brought the suit against the Justice Department under the Administrative Procedure Act. The district court entered summary judgment against her, but

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[1]Petitioner alleges that EEOC acted against her discriminatorily and in retaliation for earlier successful litigation which arose in its Atlanta Region. That portion of the case is not before the Court.

in 1983 the Court of Appeals for the District of Columbia Circuit found that the record "raise[d] a strong inference that her request was accorded disparate treatment in comparison to other applications . . . [by] similarly situated applicants," that the government's stated reasons for denying her counsel were "facially insufficient," and that the third one "appears retaliatory and, as such, an impermissible basis for agency action." Footnote omitted. *Falkowski v. EEOC,* 719 F.2d 470, 480-482 (D.C. Cir. 1983) (APP. 24a).

The government petitioned for certiorari on the APA claim on the ground that Justice Department decisions to provide or withhold legal counsel for federal managers who are sued is "committed to agency discretion" and immune from judicial review.

This Court rendered its opinion in *Heckler v. Chaney,* 470 U.S. — on March 20, 1985. On April 1, 1985, this Court granted the government's Petition for Writ of Certiorari in this case, and vacated and remanded the case to the United States Court of Appeals for the District of Columbia Circuit for a further consideration in light of *Heckler v. Chaney,* 470 U.S. — (1985) (APP. 48a). The Court of Appeals accordingly issued a decision (APP. 49a) June 21, 1985, *Falkowski v. Equal Employment Opportunity Commission,* 764 F.2d 907. In that decision, the Court of Appeals reversed itself with respect to the question of whether a Department of Justice decision not to provide counsel to a government manager is reviewable. It found the challenged decision "in many ways analogous to deciding whether to enforce a statute." The Circuit Court issued its opinion with one of the three Judges not participating and without awaiting briefs.

A petition for rehearing and suggestion for rehearing *en banc* was filed by Falkowski, and joined by the American Civil Liberties Union Fund of the National Capital Area as amicus. The Petition was denied on February 18, 1986 in a decision published at 783 F.2d 252, APP. 56a.

On the Petition for Rehearing, Judge Ginsberg now joining two members of the original panel, the Court of Appeals reaffirmed its position. In so doing, the Court completely ignored an express impermissible ground it earlier noted and erroneously inferred facts to support its conclusions. Where the Court had earlier found that the refusal to provide government counsel to Falkowski because she was involved in litigation with the government was impermissible, 719 F.2d at 480-482 (APP. 24a), and whereas it earlier cited testimony showing that Falkowski was the only known example of an official of the government sued officially who was not represented by the government, the Court of Appeals now found "no colorable claim that the Department's refusal to furnish appellant with a lawyer transgresses any constitutionally protected right . . . [or] that she has been treated so dissimilarly from similarly situated employees as to implicate constitutional concerns." APP. 59a. The Court of Appeals concluded on rehearing that a presumption of reviewability of representation decisions "has been rebutted" in light of *Chaney* (whereas in its first opinion, it held that it was unreviewable in light of *Chaney*). The Court did not make clear whether such decisions are generically unreviewable.

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## REASONS FOR GRANTING THE PETITION

This case, on which the Court has already granted certiorari, is back after remand. Among the important questions it presents is the manner in which the presumption against reviewability under APA § 701(a)(2) enunciated in *Heckler v. Chaney* is applied to other decision-making processes of the government. Although this Court, in the *Chaney* decision, indicated that its application was narrow, 470 U.S. at —, 105 Sup.Ct. at 1659, the *Chaney* decision has has already been applied to prevent review of a 1978 decision by the Department of Justice to deny access to government-supplied legal counsel to a federal manager who was sued officially and individually. Grounds for the denial included that she was suing her employer.

The important unanswered questions raised in *Heckler v. Chaney* concern the criteria by which an administrative decision is determined to be presumptively unreviewable and whether, irrespective of such presumption, manifest impermissible considerations in connection with the decision mandate review. Those factors which caused the Court to decide earlier that a Petition for Certiorari would be granted in the case remain; moreover, they are amplified by the erroneous application by the District of Columbia Circuit Court of *Heckler v. Chaney.*

1.

## THE DECISION BELOW, BY ERRONEOUSLY INVOKING HECKLER v. CHANEY BY "HISTORICAL ANALOGY" TO APPLY TO THE AGENCY ACTION IN THIS CASE, RAISES THE IMPORTANT ISSUE OF HOW AN AGENCY DECISION, OTHER THAN A PROSECUTORIAL DECISION, IS PRESUMED UNREVIEWABLE.

In *Heckler v. Chaney,* this Court held that the decision by an agency whether to enforce a statute is presumed to be unreviewable under the Administrative Procedure Act, § 701(a)(2). The Court found that cases of this type should be presumed unreviewable pursuant to the § (a)(2) exception ("committed to agency discretion") because first, "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." 470 U.S. at —, 105 Sup.Ct. at 1056. Second, this Court held that,

> when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts are often called upon to protect. Similarly, when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner.

*Id.* Third, the Court analogized the refusal to institute enforcement proceedings to the decision of a prosecutor not to bring a criminal case, "a decision which has long been regarded as the special province of the Executive Branch" and thus unreviewable. The Court further stated

that a presumption of unreviewability "may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." 470 U.S. at —, *id.* (footnote omitted).

Neither Court of Appeals Opinion analyzes this case using the points of analysis by this Court in *Chaney*. In both the decisions, the Court essentially relies solely upon an historical analogy between a decision to deny access to counsel to a federal manager and a prosecutorial decision. Nevertheless, historical data provided to Congress (see Staff of Subcom. on Administrative Practice and Procedure of the Senate Comm. on Judiciary, 95th Cong., 2d Sess., *Report on Juctice Department Retention of Private Legal Counsel to Represent Federal Employees in Civil Lawsuits* 6 (Comm. Print 1978), quoted in *Falkowski v. EEOC* (APP. 24a), 719 F.2d 470, 482 (D.C. Cir. 1983)) (excerpts, APP. 61a *et seq.*) shows that the Justice Department admitted it *always* provides counsel to federal employees sued officially. No exception other than this case was produced by the government in any of the arguments before any of the courts that have considered this. Petitioner respectfully asserts that an historical analogy is not only inaccurate, but insufficient to reverse the long-standing presumption of legions of applicable APA cases in favor of reviewability.

The second *Chaney* factor, that non-enforcement does not infringe on individual liberty or property is also not applicable here. The government's refusal to provide Ms. Falkowski counsel for the lawsuits by her subordinate cost her tens of thousands of dollars before he withdrew the suits after her discovery and several hearings. Her liberty

was also infringed. Lack of access to counsel with and equal to that of her co-defendants prevented her clearing up misunderstandings and helping to resolve conflicts of interest with them.

Early lack of notice and lack of counsel damaged petitioner's reputation. She was never able to erase erroneous published findings when her deputy won a preliminary injunction and his suit was then mooted on grounds of subsequent agency action. The denial to her of government counsel when she was sued for official action because she was challenging through litigation a proposed adverse action (later withdrawn) on its face restricts liberty.

As noted, any analogy of decision in this case to prosecutorial discretion is weak; nevertheless, even prosecutorial decisions are not unfettered. *E.g.*, see *Thigpen v. Roberts*, 468 U.S. 27 (1984); *Wayte v. United States*, 470 U.S. —, 105 Sup.Ct. 1524 at 1531 (1985). Plaintiff alleged that her statutory and constitutional rights were violated, and that these grievances are redressable under the APA. Action "contrary to constitutional right, power, privilege, or immunity" violates § 706 (2) (A) and (B) of the APA. Such violations are redressed under the APA in *Rusk v. Cort*, 369 U.S. 367 (1962), cited in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

The Court of Appeals decision after remand raises the important issues of when the presumption favoring reviewability under the APA can be reversed by a mere analogy of the agency conduct in question to prosecutorial discretion and what criteria are required for such reversal.

**2.**

## THE COURT OF APPEALS INTERPRETATION OF CHANEY RAISES THE ISSUE OF WHAT CONSTITUTES SUFFICIENT "LAW TO APPLY" TO RENDER APA § 701(a)(2) INAPPLICABLE.

Citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), at 410, this Court in *Heckler v. Chaney* noted with regard to the § (a)(2) exemption,

> [E]ven where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.

470 U.S. at —, 105 Sup.Ct. at 1649. In the context of the *Chaney* decision, this Court held that the decision to enforce a statute is one not suitable for judicial review, although this is a rebuttable presumption. Presumably, however, if there is "law to apply," then the § (a)(2) exception is inapplicable. The effect of alleged constitutional violations or inferable statutory violations, and thus, according to *Jean v. Nelson*, — U.S. —, 105 Sup.Ct. 2992 (1985), the presence of impermissible considerations on the application of the § (a)(2) exception, are raised by this case. They are not fully answered by *Chaney*. See concurring opinion of Justice Brennan at — U.S. —, 105 Sup.Ct. at 1660.

The Court of Appeals below erroneously invoked the § (a)(2) exception to this case. First, one of the applicable statutes itself presents a standard "in the interests of the United States." That standard has been recognized

by Justice Department officials and the Comptroller General (APP. 66a-69a, 72a-76a) as a "§ 517 interest" which covers provision of counsel for federal employees who are sued in order to protect employee morale, and other governmental and individual rights and interests. Further, considerations based on race, conflict of interest, or exercise of express or implied statutory or constitutional rights cannot be "in the interest of the United States." The interests of the government" standard is as specific as that against which *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), was reviewed; *i.e.*, that a street could not traverse the park "unless there is no feasible alternative".

Second, impermissible considerations in connection with the Department of Justice decision in this case constitute, among other things, violations of the First Amendment right to petition for redress and of statutes such as 18 U.S.C. §§ 2511(2) (c) and (d), merit protection law, and Title VII. Whether they render § 701(a)(2) inapplicable, or rebut a presumption against reviewability (assuming any such presumption) are important issues before this Court.

## A.

## Two Underlying Statutes, 28 U.S.C. § 517 and 5 U.S.C. § 3106, Provide A Standard And "Law To Apply."

28 U.S.C. § 517 provides

> the Solicitor General or any other officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit

> pending in a court of the United States, or in a court of a state, or to attend any other interests of the United States.

Though the wording appears to be permissive, conditions may make such a statute mandatory. See *Mason v. Fearson,* 50 U.S. 50 (9 How) 248, 259, 13 L.Ed. 125 at p. 258 (1850 Term):

> where a statute directs the doing of a thing for the sake of justice or the public good, the word may is the same as the word shall.

Title 5 U.S.C. § 3106 provides *inter alia* that, except as otherwise provided by law,

> [T]he head of an Executive Department or military department may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefore, but shall refer the matter to the Department of Justice.

Petitioner was sued for five million dollars in damages as Executive Director of a federal office, but had no authority to hire counsel to protect the government. Yet, a judgment against her in an official capacity would have imposed liability against the United States. *E.g., Brandon v. Holt,* 470 U.S. 134, 105 Sup.Ct. 873 (1985).

Against this background—a federal employee not being allowed to represent the interests of the United States, in that counsel must be arranged by the Justice Department—the government has in every other case before petitioner's provided counsel to a government employee sued officially. The Department of Justice has represented to the Congress that it *always* represents employees sued officially, excerpts (APP. 65a-71a) from *Report on Justice*

*Department Retention of Private Legal Counsel to Represent Federal Employees in Civil Lawsuits* 6 (Comm. Print 1978). One issue is thus whether a standard is set by the overwhelming and unbending uniform practice of the government in the face of the interplay of these two statutes.

The "interests of the United States" is an historic standard. For example, assertion by the Department of Justice that "interests of the government" precluded review when certain citizens were on an Attorney General's "list" as security risks was rejected in *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 168 (1951). "Interests of the United States" is a standard as judicially reviewable as "efficiency of the service," the standard against which federal adverse actions are reviewed as chronicled in *Arnett v. Kennedy*, 416 U.S. 134 at 139-140, 230 (1974) and refined in *Cleveland Board of Education v. Loudermill*, 470 U.S. —, 105 S.Ct. 1487 at 1494 (1985).

**B.**

**Impermissible Considerations.**

In the context of *Heckler v. Chaney*, this Court stated that in order to decide whether the presumption against reviewability of *enforcement decisions* is rebutted, it is necessary to decide if there is "law to apply" under § 701(a)(2). In the absence of "law to apply," this Court held that "an agency refusal to institute proceedings was a decision 'committed to agency discretion by law' within the meaning of that section." 470 U.S. at —, 105 Sup.Ct. at 1649. The question nevertheless remains whether there are impermissible motives and statutory or constitutional violations.

As Professor Sunstein said in her learned article, "Reviewing Agency Inaction After *Heckler v. Chaney*," 56 University of Chicago Law Review 653 (1985),

> At the same time, a statute that is phrased in permissive terms—stating, for example, that an agency "may" act in a category of cases—should not immunize action from review. In some circumstances, inaction may be based on factors that are impermissible even under "permissive" statutes. Decisions resting on impermissible factors are unlawful even if the agency has discretion not to act when the proper factors are taken into account.

52 University of Chicago Law Review at 682, n. 155. This is not inconsistent with this Court's observation in *Chaney* that, "no colorable claim is made in this case that the agency's refusal to institute proceedings violated any constitutional rights of respondents, and we do not address the issue that would be raised in such a case." 470 U.S. at —, 105 Sup.Ct. at 1659. This case raises this unanswered issue.

In the current litigation, the first time around, the Court of Appeals saw such impermissible factors expressed in this record. The Department of Justice had advanced three reasons for not supplying counsel to Ms. Falkowski, all of which were rejected by the Court of Appeals. The first reason rejected, "the clearly personal nature of the dispute between Ms. Falkowski and Mr. Perry," was in connection with two suits he ultimately withdrew as to petitioner. [The government acknowledges (APP. 7a) proof of his insubordination toward his supervisor, Petitioner.]

The second reason, that the recording of her conversation with her Deputy by Petitioner (after her agency grievances were ignored) was contrary to an internal EEOC directive, was also rejected by the Court of Appeals (APP. 23a, 24a), and an equally valid reason for rejecting it which review will show is that an administrative charge on the same ground against Petitioner by her agency was dropped after she answered and submitted documents.[2] See decision contemporaneous with that in *Chaney* regarding erroneous governmental action, *Cleveland Board of Education v. Loudermill,* 470 U.S. —, 105 S.Ct. 1487, 1493 (1985).

The third reason, the fact that Ms. Falkowski had sued the government in a separate action was termed the "least satisfactory of all. On its face, it appears retaliatory and as such an impermissible basis for agency action." (APP. *infra* at 24a). Besides cases cited providing for review of vindictive prosecution, other cases which support review of alleged impermissible bases for action include *Sherbert v. Verner,* 374 U.S. 398 (1963); *Johnson v. Robison,* 416 U.S. 361, 366 (1974), *Yick Wo v. Hopkins,* 118 U.S. 356, 372-374 (1886); *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 249-250 (1980); and *Jean v. Nelson, supra.*

If indeed, as alleged, the Department of Justice refused to provide legal counsel to Ms. Falkowski when her deputy sued her because she had had to bring a lawsuit against her agency, that violates her rights under the First Amendment and is contrary to Title VII. If it

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[2] The legislative history of 18 U.S.C. § 2511(2)(c) and (d) for one. (TR A-130 at 143).

treated her in a fashion disparate from the way in which every other United States employee ever sued in official capacity was treated before her, that violates her rights under the Fifth Amendment. And if, as alleged, the decision not to represent her was made with absolutely no input at all from her, that violates due process rights to confront a stigmatizing decision which affects a sizeable property right.

All of these violations are impermissible and contrary to law, and as found in the first Court of Appeals decision, should be enough to mandate review. They also should be enough to rebut any presumption against review. Petitioner believes that how such a presumption is rebutted is worthy of consideration by this Court.

The decisions below subsequent to remand by this Court cannot stand without undermining important precedents of this Court and without appearing to have the imprimatur of this Court because they will be thought to apply *Chaney*.

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## CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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May 1986

APPENDIX A

# UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 82-1446

EVELYN FALKOWSKI, APPELLANT

*v.*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

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Appeal from the United States District Court
for the District of Columbia
(D.C. Civil No. 81-01776)

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Decided October 14, 1983

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*John D. Grad*, with whom *Owen E. Perry* was on the brief, for appellant.

*R. Lawrence Dessem*, Attorney, Department of Justice, with whom *Stanley S. Harris*, United States Attorney, *Barbara L. Herwig*, Attorney, Department of Justice, and *Vella M. Fink*, Attorney, Equal Employment Opportunity Commission, were on the brief, for appellees. *Anthony J. Steinmeyer*, Attorney, Department of Justice, also entered an appearance for appellees.

Before ROBINSON, *Chief Judge*, WILKEY, *Circuit Judge*, and MCGOWAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* MCGOWAN.

MCGOWAN, *Senior Circuit Judge:* This appeal is from the District Court's grant of summary judgment against plaintiff Evelyn Falkowski, a high-level career

employee of the Equal Employment Opportunity Commission (EEOC or Commission). In her complaint, Ms. Falkowski sought a judgment against the Commission and the Department of Justice (DOJ or Department) compelling them to reimburse her for past legal expenses and to provide future legal representation in two lawsuits brought against her by a subordinate during her tenure as director of EEOC's district office in Birmingham, Alabama. Plaintiff alleges that the defendant government agencies have denied her reimbursement and representation in these suits either for discriminatory and retaliatory motives in contravention of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (1976 & Supp. V 1981), or through arbitrary and capricious agency action in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1976).

After Ms. Falkowski filed her complaint in District Court, the defendant government agencies moved in the alternative for dismissal or summary judgment. Although it found that the complaint stated valid causes of action under Title VII and the APA, the District Court nonetheless granted defendants' motion for summary judgment. *See Falkowski v. EEOC*, No. 81-1776 (D.D.C. Mar. 4, 1982). Plaintiff thereafter filed this appeal challenging the District Court's grant of summary judgment on three of her causes of action. We affirm the District Court's judgment as to plaintiff's first cause of action, but reverse as to the second and third because genuine issues of material fact relevant to those claims remain in the case.

I

The history of Ms. Falkowski's struggles with the EEOC stretches back to 1973 and encompasses an intervening volume of courtroom litigation and agency proceedings that for sheer sinuosity falls nothing short of Kafkaesque. Fortunately for purposes of the present opinion, we need recount only a portion of the various

judicial and administrative antecedents to the case now before us.

A. *The Background Litigation for Which Plaintiff Seeks Government Representation and Reimbursement*

Ms. Falkowski began her career with the EEOC in 1967 and by 1971 had become head of the Commission's newly formed office in Jackson, Mississippi. At the time, she was one of the few women professionals employed by EEOC in its southeastern region. After two years in the Jackson office, Ms. Falkowski sought a transfer to the Birmingham district office for both personal and professional reasons. When repeated attempts to procure her transfer failed, she brought suit against the EEOC alleging sexual discrimination as the motive for the agency's inaction. The matter was settled in apparently amicable fashion in the fall of 1974 when the Commission agreed to appoint Ms. Falkowski director of the Birmingham office. *See Falkowski* v. *Powell*, No. 73-P-1009-S (N.D. Ala. Sept. 9, 1974) (consent decree).

1. *The Perry v.* Golub *Litigation*

Following Ms. Falkowski's arrival in the Birmingham office, a series of disputes broke out between her and number of her subordinates, but principally with the office's deputy director, Bertram Perry. On his side, Mr. Perry alleged that the friction stemmed from his justified protests against mismanagement by Ms. Falkowski; in particular, he pointed to a series of procedural irregularities purportedly reflecting overzealousness and bias on her part in favor of plaintiffs in certain Title VII actions. *See Perry* v. *Golub*, 400 F. Supp. 409, 411-12 (N.D. Ala. 1975), *vacated as moot*, 594 F.2d 862 (5th Cir. 1979). On her side, Ms. Falkowski contended that the conflict arose from her attempts to discipline rank

insubordination and oppressive behavior against office personnel by Mr. Perry. *See* Brief for Appellant at 8.[1]

As the conflict deepened, both parties began to seek support for their respective positions from superiors in the Atlanta regional office. A series of investigations ensued that resulted in EEOC's decision, first to suspend Ms. Falkowski's authority as district director, and then to transfer both parties out of the Birmingham office. Ms. Falkowski immediately presented a pleading in federal district court challenging her transfer as a violation of the 1974 consent decree.[2]

Mr. Perry likewise brought suit in federal district court to enjoin his own transfer out of Birmingham. His complaint named Ms. Falkowski and two other superiors, Messrs. Golub and Hollowell, as defendants. *See Perry* v. *Golub*, 400 F. Supp. 409 (N.D. Ala. 1975), *vacated as moot*, 594 F.2d 862 (5th Cir. 1979). Alleging that the transfer violated his first amendment and other civil rights, Mr. Perry accused his EEOC superiors of attempting to silence his protests as a "whistleblower" and of discriminating against him on account of his race, which is black. These steps marked the beginning of the *Perry* v. *Golub* litigation, the first of the two suits for which plaintiff-appellant today seeks reim-

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[1] This court expresses no opinion on the merits of these contentions and notes that apparently no other court or agency has ever ruled definitively on them either. *See* Perry *v.* Falkowski, No. 78-PT-0935-S, slip op. at 2 (N.D. Ala. Apr. 17, 1981) (unpublished opinion granting plaintiff's motion for voluntary dismissal).

[2] Just prior to making this pleading, Ms. Falkowski had filed two administrative charges of employment discrimination against EEOC. In these charges, she alleged that the agency was undermining her authority in retaliation for her earlier suit against the Commission and because her predominantly black male superiors in Atlanta did not wish to see a white female in the Birmingham district-director post. *See* Appendix at 162-63 (reproducing charges of July 9, 1975, and August 15, 1975).

bursement and representation from the government in this court.

On August 29, 1975, the United States District Court for the Northern District of Alabama acted on Mr. Perry's complaint. A hearing was held in which EEOC attorneys appeared on behalf of all three defendants, including Ms. Falkowski, and in which private counsel for Ms. Falkowski was also present. At the hearing's conclusion, the district judge granted Mr. Perry's motion for a preliminary injunction barring his transfer from the Birmingham office. Under an informal agreement with the EEOC, Ms. Falkowski was allowed to "tag" along" on this injunction, thus suspending her transfer as well. As a result of this agreement, the district court agreed to take no action on Ms. Falkowski's separate pleading for relief under the earlier 1974 consent decree.[3]

The next relevant action in *Perry* v. *Golub* came in November 1976 when the district court granted Mr. Perry's motion to drop Ms. Falkowski as a defendant in the action. At roughly the same time, the court also acted to dissolve its preliminary injunction on grounds that efforts to remove Mr. Perry from his post were no longer afoot. Ms. Falkowski thereafter appealed her dismissal from the case, contending that EEOC attorneys had inadequately defended her in the 1975 preliminary-injunction hearing, and that she wished to remain in the action to clear her name. The United States Court of Appeals for the Fifth Circuit affirmed the district court's dissolution of the injunction on grounds of

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[3] See Falkowski *v.* Perry, No. 76-G-0545-S, slip op. at 3 (N.D. Ala. Feb. 13, 1981) (unpublished opinion granting in part plaintiff's petition for costs and attorneys' fees), *aff'd*, No. 81-7278 (11th Cir. Oct. 25, 1982), *cert. denied*, 52 U.S.L.W. 3257 (U.S. Oct. 3, 1983).

mootness,[4] and in an apparent nod to Ms. Falkowski vacated the underlying proceedings "so as to spawn no consequences." *Perry* v. *Golub*, 594 F.2d 862 (5th Cir. 1979) (No. 77-1719) (unpublished opinion).[5]

Numerous other controversies have emerged in the *Perry* v. *Golub* litigation since that time, including a dispute over the district court's retention of jurisdiction in the case after 1976[6] and a petition by Mr. Perry for costs and attorneys' fees.[7] Ms. Falkowski meanwhile had instituted parallel litigation of her own against EEOC superiors which has followed an equally labyrin-

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[4] The Fifth Circuit apparently mistook Ms. Falkowski's appeal of her dismissal from the case as an appeal of the district court's decision to dissolve the injunction. *See* Perry *v.* Golub, 25 Empl. Prac. Dec. (CCH) ¶ 31,488, at 18,936-38 (N.D. Ala. 1980) (noting on remand that the appellate court confused the issues before it on appeal), *vacated and remanded*. No. 81-7278 (11th Cir. Oct. 25, 1982). Once rendered, however, the Fifth Circuit's ruling became the law of the case. *See* Perry *v.* Golub, No. 81-7278, slip op. at 2-3 (11th Cir. Oct. 25, 1982) (Fifth Circuit precedent held case moot after May 1976 despite district court's opinion to the contrary and intervening transfer of appellate jurisdiction to the newly formed Eleventh Circuit).

[5] The court of appeals' "nod" was merely in recognition of the preliminary nature of the district court's factual findings and not in support of Ms. Falkowski's other allegations. At the 1975 preliminary-injunction hearing, the district court made numerous findings of fact suggesting improper conduct on Ms. Falkowski's part. *See* Perry *v.* Golub, 400 F. Supp. 409, 411-15 (N.D. Ala. 1975), *vacated as moot*, 594 F.2d 862 (5th Cir. 1979). The Fifth Circuit evidently felt it unfair to leave these preliminary findings on the record absent the opportunity for a full hearing on the merits.

[6] Perry *v.* Golub, 464 F. Supp. 1016 (N.D. Ala. 1978), *vacated as moot*, 599 F.2d 1052 (5th Cir. 1979). *See also supra* note 4.

[7] *See* Perry *v.* Golub, 25 Empl. Prac. Dec. (CCH) ¶ 31,488 (N.D. Ala. 1980) (granting plaintiff's petition for costs and attorneys' fees), *aff'd in part and vacated and remanded in part*, No. 81-7278 (11th Cir. Oct. 25, 1982).

thine procedural course.[8] The details of these other proceedings, however, are not immediately relevant to the case before us.

2. *The* Perry *v.* Falkowski *Litigation*

During the pendency of the *Perry* v. *Golub* litigation, Ms. Falkowski and Mr. Perry remained together in the Birmingham office on terms that few would describe as cordial. In an attempt to gather evidence corroborating her charges of continuing insubordination by Mr. Perry, Ms. Falkowski secretly recorded a confrontation with him that occurred in her office on July 18, 1977. Besides insubordination, the recording revealed a regrettable stream of obscenities and racial epithets on Mr. Perry's part. *See* Appendix at 11-19 (transcript of tape recording). What Ms. Falkowski's conduct might have been in the absence of a recording device known only to himself, one can only conjecture. The incident served to underscore, however, the depths to which professional relationships and behavior had sunk in the Birmingham office by mid-1977.

On the basis of the tape-recording incident, the EEOC moved to terminate both Mr. Perry and Ms. Falkowski from its employ. The Commission justified its action in Mr. Perry's case on the basis of the tape's content. In Ms. Falkowski's case, the Commission found that she had violated an internal agency order prohibiting nonconsensual recording of official conver-

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[8] *See, e.g.*, Falkowski *v.* Perry, No. 76-G-0545-S (N.D. Ala. Feb. 13, 1981) (unpublished opinion granting in part plaintiff's petition for costs and attorneys' *fees*), *aff'd*, No. 81-7278 (11th Cir. Oct. 25, 1982), *cert. denied*, 52 U.S.L.W. 3257 (U.S. Oct. 3, 1983); Falkowski *v.* Perry, 464 F. Supp. 1016 (N.D. Ala. 1978), *vacated as moot*, 599 F.2d 1051 (5th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

sations by agency personnel. *See Perry* v. *Golub*, 464 F. Supp. at 1019 & n.2 (citing EEOC Order No. 165).[9]

Provoked by Ms. Falkowski's ruse and disturbed by the resulting personel action. Mr. Perry filed suit in 1978 in federal district court against Ms. Falkowski and EEOC chairwoman Eleanor Norton. The complaint sought a declaratory judgment that Mr. Perry's constitutional and statutory rights had been violated, and prayed for compensatory and punitive damages totalling over five million dollars. This step commenced the *Perry* v. *Falkowski* litigation, the second suit for which plaintiff-appellant today seeks reimbursement and representation from the government in this Court.

Action on Mr. Perry's complaint was delayed until 1981, when the district court granted his request for voluntary dismissal. *See Perry* v. *Falkowski*, No. CV78-PT-0935-S (N.D. Ala. Apr. 17, 1981) (unpublished opinion). At the same time, Ms. Falkowski moved for leave to file counterclaims for defamation and other charges against Mr. Perry, but the district court denied her motion. *Id.* Ms. Falkowski then filed a petition for costs and attorneys' fees as a prevailing defendant against Mr. Perry. The district court denied this petition as well, and the Eleventh Circuit affirmed the decision on appeal. Ms. Falkowski's petition for certiorari on this last issue has recently been denied by the United States Supreme Court. *See Perry* v. *Falkowski*, No. CV78-PT-0935-S (N.D. Ala. July 22, 1981) (unpublished opinion denying defendant's petition for costs and attorneys fees), *aff'd*, No. 81-7643 (11th Cir. Oct. 25, 1982), *cert. denied*, 52 U.S.L.W. 3257 (U.S. Oct. 3, 1983).

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[9] Although EEOC later abandoned its efforts to discharge Ms. Falkowski and Mr. Perry, it did succeed in having them permanently transferred out of the Birmingham office.

B. *Plaintiff's Efforts to Secure Government Representation and Reimbursement*

Of greater relevance to the present appeal have been Ms. Falkowski's earlier, unsuccessful attempts to secure representation by government counsel, or, in the alternative, reimbursement for her expenses in hiring private counsel, in the *Perry* v. *Golub* and *Perry* v. *Falkowski* litigations. Since late 1976, EEOC attorneys have apparently never undertaken to represent Ms. Falkowski in any of the proceedings in either case, even though government counsel has been provided to each of her codefendants. To date, Ms. Falkowski has amassed substantial legal bills conducting her own defense with private attorneys in these cases.

1. *Plaintiff's Efforts to Secure Representation and Reimbursement in* Perry *v.* Golub

Prior to the filing of Mr. Perry's complaint in *Perry* v. *Golub* in late August 1975, Ms. Falkowski had already filed two charges of employment discrimination against EEOC and her immediate supervisors in Atlanta. *See* Appendix at 162-63 (reproducing charges of July 9, 1975, and August 15, 1975). These charges alleged that the agency and her superiors were undermining her authority by granting preferential treatment to a black male subordinate (presumably Mr. Perry) and by failing to support her in efforts to control insubordination on his part. The charges recited sex and race discrimination, as well as retaliation for her earlier 1973 suit, as the motives for the agency's conduct.

On December 12, 1976, over eighteen months later, Ms. Falkowski filed an amendment to these earlier charges with the then acting chairwoman of EEOC, Ethel Walsh. *See* Appendix at 168-69 (Memorandum from Evelyn Falkowski to Ethel Walsh (Decmeber 12, 1976)). Although nowhere in her statement did Ms.

Falkowski request representation or reimbursement from the agency, she did in somewhat oblique terms challenge the quality of her representation by EEOC attorneys in the *Perry* v. *Golub* litigation. The amendment alleged, for example, that she had been "prejudiced before a Federal District judge," apparently by agency counsel's failure to rebut unsubstantiated charges and perjured testimony introduced against her (again, presumably by Mr. Perry) in the case. *Id.*

Without entering into excruciating detail on this point, suffice it to say that at every turn in the ensuing administrative complaint and appeals process, arising out of not only these incidents but others as well, Ms. Falkowski continued to assert that EEOC for discriminatory and retaliatory reasons had failed to provide her with an adequate defense in the *Perry* v. *Golub* litigation. *See, e.g.*, Appendix at 178-79, 184-85, 189-90, 197, 202, 205, 281. Although in the context of these administrative proceedings she never raised a specific claim for representation or reimbursement linked to her charges of inadequate defense, we are willing to assume for purposes of the present appeal that the goal of her complaints was to secure agency legal assistance in clearing her name, promotions and retroactive raises denied her because of damage to her reputation, and finally some form of restitution for the legal expenses she incurred in carrying on her own defense with private counsel.

2. *Plaintiff's Efforts to Secure Representation and Reimbursement in* Perry *v.* Falkowski

Ms. Falkowski's efforts to secure government legal representation and reimbursement have been more explicit in the case of the *Perry* v. *Falkowski* litigation. Mr. Perry filed his initial complaint in that case on August 24, 1978. His suit was against Ms. Falkowski for secretly taping his outburst one year before and against EEOC chairwoman Norton for attempting to discharge

him based on the tape's content. *See* Appendix at 108-10 (reproducing Mr. Perry's complaint). Although EEOC attorneys defended Ms. Norton in that action, they provided no defense for Ms. Falkowski at all.

After learning that EEOC attorneys would not defend her, Ms. Falkowski immediately requested that the Commission secure Department of Justice representation for her. What ensued was an episode of bureaucratic red tape and temporizing that did not end until May of the following year when DOJ finally denied Ms. Falkowski's request. *See* Appendix at 101-03 (declaration of John Seibert, Assistant Director of Federal Programs Branch, DOJ Civil Division).

Frustrated by the delay with which her request was being processed, Ms. Falkowski consulted with an EEO counselor at the Commission on November 20, 1978, and filed a corresponding administrative complaint one month later on December 19th. *See* Appendix at 189-90, 24, 281. In her interview and complaint, she charged that EEOC was continuing to discriminate and retaliate against her by, in effect, denying her legal defense in the *Perry* v. *Falkowski* suit. She demanded that appropriate representation be provided immediately. The counselor's report quoted EEOC legal counsel as saying that the Commission could not provide legal defense for Ms. Falkowski and that the matter had been forwarded to the Department of Justice for handling. *Id.* at 190 (Counselor's Survey of December 6, 1978).[10]

The reasons for the delay in processing Ms. Falkowski's request for counsel appear to have been multiple. First, no one informed her that she had to submit her

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[10] The EEOC took final action on Ms. Falkowski's administrative complaint two years later, when it cancelled the complaint based on the District Court's decision in the case presently before us. *See* Appendix at 281-82 (Letter from Gilbert Sandate to Evelyn Falkowski (March 24, 1982)).

petition directly to the Department of Justice rather than to her immediate employing agency, EEOC. Second, despite repeated requests from DOJ, EEOC failed to certify in writing that Ms. Falkowski had been acting within the scope of her official duties when she recorded her conversation with Mr. Perry the year before. That certification did not come until December 20, 1978. Finally, between that date and May of the following year, the Department of Justice simply failed to act on Ms. Falkowski's request. By that point, of course, the request had been transformed from one for representation only into one for representation and reimbursement, since the deadline for filing an answer to the *Perry* v. *Falkowski* complaint had already long since passed and Ms. Falkowski had had no choice but to utilize private counsel of her own.

Finally, on May 17, 1979, Assistant Attorney General Barbara Babcock wrote to EEOC and Ms. Falkowski to deny the request for representation and reimbursement in connection with the *Perry* v. *Falkowski* suit. Her letter gave the reason for the Department's action as follows:

> In light of the clearly personal nature of the dispute between Ms. Falkowski and Mr. Perry giving rise to the litigation, the tape recording by Ms. Falkowski of Mr. Perry's remarks in contravention of an internal EEOC directive, and the existence of separate actions by Ms. Falkowski and Mr. Perry challenging proposed personnel actions against them, I do not believe it is in the interest of the United States to reimburse Ms. Falkowski for her legal costs. Accordingly, pursuant to 28 C.F.R. § 50.15 (a)(2), I am denying Ms. Falkowski's request.

Appendix at 116. Following this denial, Ms. Falkowski asked the Department several times to reconsider its action, but each time DOJ acted to reaffirm its earlier decision.

II

Following these twists and turns in the federal courts of Alabama and Georgia and before the various administrative agencies here in Washington, Ms. Falkowski finally filed suit against EEOC and DOJ in United States District Court for the District of Columbia. In her complaint, she alleged three statutory causes of action: (1) one against EEOC under Title VII for discriminatory and retaliatory denial of adequate government legal representation in *Perry* v. *Golub*, (2) another against EEOC under Title VII for its actions in the *Perry* v. *Falkowski* litigation, and (3) a final cause of action under the APA against the Department of Justice for arbitrary and capricious denial of government legal representation in *Perry* v. *Falkowski*.[11] *See* Brief for Appellant at 15-16; *infra* note 12.

Before filing an answer, the defendant government agencies moved in the alternative for dismissal or summary judgment. The District Court, in an unpublished opinion, granted the defendants' motion for summary judgment on all three statutory claims.[12]

As to the first cause of action, the District Court ruled that EEOC attorneys had actually represented Ms. Falkowski in the *Perry* v. *Golub* litigation, and

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[11] The Administrative Procedure Act, of course, does not confer independent subject matter jurisdiction on federal district courts to review federal agency action. Califano *v.* Sanders, 430 U.S. 99, 105 (1977). Rather, such jurisdiction is based on general federal question jurisdiction under 28 U.S.C. § 1331 (Supp. V 1981). The APA merely provides the appropriate scope of review, once jurisdiction is otherwise available.

[12] Ms. Falkowski also alleged several constitutional causes of action under the first and fifth amendments which the District Court dismissed outright. *See* Falkowski *v.* EEOC, No. 81-1776, slip op. at 1-2 (D.D.C. Mar. 4, 1982). Plaintiff, however, has chosen not to appeal the dismissal of these claims. *See* Brief for Appellant at 15-16.

that she therefore had no claim against the Commission for denial of legal counsel in that case. *See Falkowski* v. *EEOC*, No. 81-1776, slip op. at 1 n.1 (D.D.C. Mar. 4, 1982). In the alternative, the District Court held that, even if Ms. Falkowski did have such a claim, it was time-barred by her failure to file a formal administrative complaint with the EEOC within thirty days after the claim arose. *Id.* (citing 29 C.F.R. § 1613.214(a)(1)(i) (1980)).

On Ms. Falkowski's second cause of action, the District Court noted that EEOC lacks authority to appoint or reimburse private legal counsel to defend agency personnel, and that the Commission's power is therefore limited to recommending such action to the Department of Justice. *Id.* at 2 (citing 28 U.S.C. § 517 (1976) and 28 C.F.R. §§ 50.15-50.16 (1980)). Because EEOC did recommend that DOJ reimburse Ms. Falkowski for her private legal expenses in *Perry* v. *Falkowski*, the District Court held that she had no claim against the Commission under Title VII for denial of legal counsel in that case either. Although Ms. Falkowski contended that the EEOC recommendations had been pretextual, the District Court noted that she had presented "no admissible evidence" to support this point, and had therefore failed to establish a prima facie case. *Id.*

Finally, as to the third cause of action, the District Court concluded that the Department of Justice had not acted arbitrarily or capriciously in denying Ms. Falkowski's request for government representation and reimbursement in *Perry* v. *Falkowski*. The court noted that the DOJ had considered Ms. Falkowski's request under the applicable statutes and regulations,[13] and had prop-

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[13] The Attorney General has promulgated regulations governing the representation of federal employees by government-provided legal counsel in certain proceedings in which those employees are sued or subpoenaed in their individual capacity. *See*

erly denied it as not "in the interest of the United States" in accordance with 28 C.F.R. § 50.15(a)(2) (1979). As evidence that the Department's conclusion on this issue had not been arbitrary or capricious, the

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28 C.F.R. §§ 50.15-50.16 (1982). Statutory authority for the regulations is claimed under 28 U.S.C. §§ 516-517 (1976) (reserving conduct of litigation involving federal officers to the Attorney General and permitting him to send officers of the Department of Justice into court to attend to the interests of the United States).

In general, the regulations provide that federal employees may be provided legal representation at government expense if such representation is in the interests of the United States and the conduct for which the employee seeks representation was committed within the scope of his employment. *See* 28 C.F.R. § 50.15 (a) (1982). Unless it feels that representation is clearly unwarranted, the officer's employing agency is required to report to the Department of Justice whether the employee was acting within the scope of his employment, and whether the agency recommends representation in his case. *Id.* § 50.15 (a)(1). Under certain circumstances in which representation by DOJ attorneys would be ethically inappropriate, private counsel may be provided to the employee at government expense. *Id.* §§50.15 (a)(9)-(10), 50.16.

The Department takes the position that it will always provide representation for federal employees sued solely in their official capacity for equitable relief. *Id.* § 50.15(a)(1). *See also* United States Attorneys' Manual § 4-13.000 (1977). Employees sued in their individual capacity for money damages, however, must request representation through the procedures outlined above. So also, it appears, must employees who fall in between these two polar categories, e.g., employees sued in both their official and individual capacities for money damages and equitable relief. Ms. Falkowski fell into this latter intermediate category as a defendant in the *Perry* v. *Falkowski* suit.

The Attorney General's regulations were first published in the *Federal Register* on January 19, 1977, *see* Limitation for Representation of Federal Employees, 42 Fed. Reg. 5695 (1977), and later codified in the *Code of Federal Regulations*, *see* 28 C.F.R. §§ 50.15-50.16 (1977). Despite subsequent clarifying amendments, *see* 47 Fed. Reg. 8172 (1982), the regulations remain in substantially their original form.

District Court cited the three reasons spelled out in Assistant Attorney General Babcock's letter of May 17, 1979, quoted earlier in this opinion. *Falkowski* v. *EEOC*, slip op. at 2-3.

III

The issue before us on this appeal is whether the District Court moved too quickly in granting summary judgment because genuine issues of material fact remain in the case. Rule 56(c) of the Federal Rules of Civil Procedure governs this issue and provides that summary judgment shall issue only when the pleadings and other materials before the court establish "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Accordingly, summary judgment is inappropriate unless the moving party can establish that the evidence presented by the parties unequivocally resolves all relevant factual and legal issues in its own favor, and that this is so even though the evidence is viewed in the light most favorable to the party opposing the motion.

Because the defendant government agencies failed to meet this burden with respect to plaintiff's second and third causes of action, we hold that the District Court erred in granting summary judgment on those claims. In all other respects, we uphold the District Court's judgment, but modify certain of the grounds on which it based its ruling.

A. *Plaintiff's First Cause of Action*

The District Court ruled that Ms. Falkowski had no cause of action under Title VII against EEOC for denial of legal expenses in *Perry* v. *Golub* because EEOC attorneys had actually represented her in that case. *Falkowski* v. *EEOC*, slip op. at 1 n.1. In the alternative, the District Court held that, even if she did have such a claim, she had lost it by failing to file a formal adminis-

trative complaint with the Commission within thirty days after the claim arose. *Id.* Pretermitting the issue of whether Ms. Falkowski preserved her claim through timely administrative filing, we uphold the District Court on the first of the two grounds proposed.

In response to the District Court's ruling that EEOC attorneys actually represented her in the *Perry* v. *Golub* litigation, plaintiff argues that her claim goes, not to the fact of representation *vel non*. but to the adequacy of the representation that EEOC did provide. *See* Brief for Appellant at 23-27. Although we might otherwise be inclined to find merit in this position,[14] we hold that plaintiff is collaterally estopped from challenging the adequacy of her representation by EEOC attorneys in the *Perry* v. *Golub* suit.

In August 1980, Ms. Falkowski filed a petition for costs and attorneys' fees as a prevailing plaintiff in

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[14] It seems fairly clear that EEOC attorneys could not have provided Ms. Falkowski an adequate defense in *Perry* v. *Golub* because of the irreconcilable conflict of interest that existed between the agency and Ms. Falkowski in that case. On the very same day that EEOC superiors appeared as co-defendants with Ms. Falkowski in the *Perry* v. *Golub* preliminary-injunction hearing, she was bringing a motion against them and the agency in the same courthouse seeking to have her own transfer set aside as violative of the consent decree entered in her prior lawsuit against the agency. As adverse parties in related litigation arising out of the same underlying dispute, the Commission (in the persons of her superiors) and Ms. Falkowski could not be adequately represented by the same counsel as a matter of law, and it was highly improper for EEOC attorneys to undertake such dual representation. *See* United States Fidelity & Guar. Co. *v.* Louis A. Roser Co., 585 F.2d 932, 938-39 (8th Cir. 1978); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-15, DR 5-105 (1981).

These are arguments, however, that Ms. Falkowski should have presented in the Northern District of Alabama and the Eleventh Circuit, not in this court. *See infra* text following this note (discussing issue of collateral estoppel).

*Falkowski* v. *Perry*, her own action against EEOC superiors briefly discussed earlier in this opinion. *See supra* note 8 and accompanying text. In her petition, she requested costs and attorneys' fees against the Commission arising, not only out of that action, but also out of her defense of the *Perry* v. *Golub* suit. This somewhat unusual request was based on the theory that Ms. Falkowski and EEOC had been adverse co-defendants in the *Perry* v. *Golub* litigation, and that to the extent that EEOC had abandoned its attempts to transfer her involuntarily, she had prevailed over the agency.

To support the conclusion that EEOC had been an adverse co-defendant in *Perry* v. *Golub*, Ms. Falkowski pointed to the defense that EEOC attorneys had provided her in that action, and contended that that defense had been not only inadequate but a sham. *See Falkowski* v. *Perry*, No. 76-G-0545-S, slip op. at 15 (N.D. Ala. Feb. 13, 1981) (unpublished opinion granting in part plaintiff's petition for costs and attorneys' fees), *aff'd*, No. 81-7278 (11th Cir. Oct. 25, 1982), *cert. denied*, 52 U.S.L.W. 3257 (U.S. Oct. 3, 1983). In denying this portion of Ms. Falkowski's petition, the United States District Court for the Northern District of Alabama flatly rejected this line of argument, finding it "not substantiated by the facts." *Id.* at 16. *See also id.* at 18-19.

Under established principles of collateral estoppel, Ms. Falkowski is not now free to relitigate these same issues before this court. Even were we to disagree with the specific findings made by the district court in Alabama, plaintiff's remedy is not to be found in this forum but through direct appeal of the judgment of which those findings form an integral part.

Given that Ms. Falkowski is collaterally estopped from asserting a key element of her first cause of ac-

tion, the District Court's grant of summary judgment against her on that claim is accordingly affirmed.

B. *Plaintiff's Second Cause of Action*

Ms. Falkowski's second cause of action charged EEOC with discrimination and retaliation under Title VII arising out of the agency's handling of her request for government-provided legal counsel in *Perry* v. *Falkowski*. The District Court granted summary judgment on this claim because, to paraphrase the court's opinion, EEOC did all it could for Ms. Falkowski when it recommended that DOJ retain private legal counsel to represent her in the case. *Falkowski* v. *EEOC*, slip op. at 2. Although we agree with the District Court that EEOC lacks statutory authority to retain private counsel itself to defend agency officers in court,[15] the bare fact of for-

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[15] Section 516 of Title 28 provides that "[e]xcept as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, ... is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516 (1976). Although EEOC is authorized by law to send its own attorneys into court to represent the Commission, only EEOC attorneys appointed to regular federal service may act in this capacity. *See* 42 U.S.C. § 2000e-4(a), (b)(2) (1976 & Supp. V 1981). Accordingly, EEOC lacks statutory authority to hire private counsel to appear in court for any reason, not merely in cases involving agency officers as defendants.

Commission attorneys could not themselves represent Ms. Falkowski in the *Perry* v. *Falkowski* litigation because of actual conflicts of interest that existed between her and the agency throughout this period. At the time of the *Perry* v. *Falkowski* suit, Ms. Falkowski had already gone into court to challenge her own proposed discharge by the agency based on the same 1977 tape-recording incident that had given rise to Mr. Perry's lawsuit. *See* Falkowski *v.* Perry, No. 76-G-0545-S, slip op. at 3-6 (N.D. Ala. Feb. 13, 1981) (unpublished opinion granting in part plaintiff's petition for costs and attorneys' fees), *aff'd*, No. 81-7278 (11th Cir. Oct. 25, 1982), *cert. denied*, 52 U.S.L.W. 3257 (U.S. Oct. 3, 1983). The agency therefore had

mal Commission recommendation was not sufficient to support defendants' motion for summary judgment on this claim.

The relevant factual inquiry instead should have been whether EEOC acting out of discriminatory animus intentionally mishandled Ms. Falkowski's request so as to undercut the force of its formal recommendation on paper. This test admittedly places a heavy burden on plaintiff to show not only that the Commission acted out of legally proscribed motives, but also that its mishandling actually resulted in DOJ's final decision to deny her representation.

Viewing the evidence in the light most favorable to plaintiff, however, we are satisfied that the record reveals triable issues of fact on both of these points. The government does not contest, for example, that EEOC delayed for over three months in certifying that Ms. Falkowski had acted within the scope of her employment despite numerous requests for such certification from the Department of Justice. Although we express no opinion on the final resolution of this issue, it is certainly a reasonable inference that EEOC was wilfully dragging its feet because it did not wish government representation to be approved at all, or at least not in time to meet the Perry complaint. Moreover, a reasonable person might conclude that, once this lack of enthusiasm on the part of Ms. Falkowski's employing agency had been communicated to the Department of Justice, DOJ was unlikely to act favorably on her request for government-provided legal counsel.

Because the government failed to dispel these obvious inferences of illegal motivation and resulting harm

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interests adverse to Ms. Falkowski's in related litigation arising out of the same underlying dispute, and EEOC attorneys were ethically bound not to represent her in the *Perry* v. *Falkowski* suit. *See* United States Fidelity & Guar. Co. *v.* Louis A. Roser Co., 585 F.2d 932, 938-39 (8th Cir. 1978); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-15, DR 5-105 (1981).

that arise from the Commission's dilatory handling of Ms. Falkowski's request, we conclude that genuine issues of material fact remain with respect to her second cause of action. The District Court's grant of summary judgment on this claim is therefore reversed.

C. *Plaintiff's Third Cause of Action*

In her third cause of action, Ms. Falkowski cited the Department of Justice for arbitrary and capricious agency action in denying her request for government-provided legal counsel in *Perry* v. *Falkowski*. The District Court granted summary judgment on this claim because it found that the Department had not acted in contravention of the APA in turning down her request. *Falkowski* v. *EEOC*, slip op. at 2-3. We find, however, that the reasons for denial articulated by the Department are facially insufficient to establish the reasonableness of its decision. Moreover, the evidence suggests that DOJ may have accorded Ms. Falkowski disparate treatment under its existing regulations and practice. The rationality of the Department's decision therefore cannot be determined without further factual inquiry, and we accordingly hold that summary judgment as to this final cause of action was inappropriate.[16]

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[16] As an alternative ground for supporting the District Court's grant of summary judgment on this claim, the Department of Justice urges that its decision is unreviewable under the APA as action "committed to agency discretion" under 5 U.S.C. § 701(a)(2) (1976). *See* Brief for Defendants-Appellees at 31-38. In support of its position, the Department sets forth a detailed analysis following the three-factor test spelled out by this Court in Natural Resources Defense Council, Inc. *v.* SEC, 606 F.2d 1031, 1043-47 (D.C. Cir. 1979). We have considered the government's arguments on this point and find them unpersuasive.

Under the first factor of the *Natural Resources* test, the Department relies particularly on the nonmandatory language of its own regulations to conclude that plaintiff has no legally protectable interests to be safeguarded through judicial oversight. *See* Brief for Defendants-Appellees at 33 ("*The Department of Justice Policy Statement ... merely provides that*

1. *The Babcock Letter*

In concluding that the Department of Justice did not act arbitrarily or capriciously in denying Ms. Falkowski's request for government counsel, the District

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'[r]epresentation by private counsel at federal expense *may* be provided to a federal employee' if certain preconditions have been met.") (quoting 28 C.F.R. § 50.16 (a) (1979) (emphasis added)). Yet the federal courts have long held discretionary denials of relief or assistance to be reviewable under the APA. *See, e.g.*, Rassano *v.* INS, 492 F.2d 220, 227 (7th Cir. 1974) (language in 8 U.S.C. § 1254 (1970) stating that "the Attorney General may, in his discretion, suspend deportation" does not bar review under the APA). The policy reasons supporting reviewability in such cases are clear. Although an aggrieved individual may have no "right" to the relief provided by the agency, he is entitled to an agency decision on his request that is at least rational and free from abuse of discretion.

Under the second factor of the *Natural Resources* test, DOJ argues that the burden of defending denial-of-representation decisions in court will divert scarce institutional resources from its congressionally assigned mission of defending other federal employees in court. Because judicial review inherently involves some costs of litigation, this fact alone cannot decide the issue of reviewability. Rather, the logic of the *Natural Resources* test rests on a pragmatic weighing of all three factors against the strong presumption of judicial review created by the APA. *See* 606 F.2d at 1043-44. Given the Department's broad latitude to determine when litigation on behalf of government defendants is in the interests of the United States, most challenges to its discretion can be handled at the dismissal or summary judgment stage. We do not believe that this reduced burden militates against the APA's presumption of reviewability.

Under the third factor, the Department points to the myriad issues bearing upon representation decisions and concludes that such determinations are inappropriate subjects for judicial review. This court appreciates the numerous legal, policy, and fiscal factors that impinge upon the Department's decisions in this area. Yet judicial review does not call for courts to substitute their own judgment for that of the agency. On the contrary, the reviewing court's scrutiny of substantive agency decisions is in most cases limited to determining whether the reasons articulated by the agency make sense. While this court has a modest appreciation for the limits of its abilities, we do not feel that such a task is beyond our powers.

Court relied heavily on the three reasons set forth in Assistant Attorney General Babcock's letter of May 17, 1977. Each of those reasons purported to show why reimbursing Ms. Falkowski for her legal expenses would not be "in the interest of the United States" as mandated by 28 C.F.R. § 50.15 (a)(2) (1979). We conclude that the various rationales proposed by the Assistant Attorney General are insufficient on their face to support the government's motion for summary judgment on the issue of reasonableness under section 706(2)(A) of the APA.

The first reason cited in the Babcock letter for denying Ms. Falkowski's request was "the clearly personal nature of the dispute between Ms. Falkowski and Mr. Perry." This does not seem a rational reason for the conclusion based upon it. Indeed, most Title VII suits concerning individual incidents of discrimination or retaliation involve disputes intensely personal in nature. Why this happenstance justifies denying government legal representation to a federal officer sued by her immediate subordinate is not immediately apparent to this court. In fact, it would appear that government counsel represent federal officials as defendants in quite acrimonious Title VII actions on a regular basis. *See, e.g., Carson* v. *Bolger*, 510 F. Supp. 106 (E.D. Mo. 1981).

The second reason given by the Assistant Attorney General was "the tape recording by Ms. Falkowski of Mr. Perry's remarks in contravention of an internal EEOC directive." This rationale, as well, does not withstand scrutiny standing on its own. The departmental regulations cited in the Assistant Attorney General's letter provide for hiring private legal counsel at government expense to defend federal officials sued in their individual capacities, *even though those officials are simultaneously under federal criminal investigation for the same acts for which representation is provided. See* 28 C.F.R. § 50.15 (a)(5) (1979). Indeed, in a

1977 letter to United States District Judge Gerhard Gesell, the Assistant Attorney General noted that DOJ had retained private counsel to defend numerous federal officials then under criminal investigation by the Department of Justice. *See* Letter from Assistant Attorney General Babcock to District Judge Gesell (May 1977), *reprinted in* STAFF OF SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 95TH CONG., 2d SESS., REPORT ON JUSTICE DEPARTMENT RETENTION OF PRIVATE LEGAL COUNSEL TO REPRESENT FEDERAL EMPLOYEES IN CIVIL LAWSUITS 150-55 (Comm. Print 1978). It is not clear why the alleged violation of an internal agency directive disqualifies a federal officer for government-provided legal representation and suspected criminal activity does not.

The third reason given for turning down Ms. Falkowski's request was "the existence of separate actions by Ms. Falkowski and Mr. Perry challenging proposed personnel actions against them." This rationale is, if anything, the least satisfactory of all. On its face, it appears retaliatory and, as such, an impermissible basis for agency action.[17] Federal officers cannot become ineligible for government-provided legal defense in individual-capacity suits merely because they have challenged earlier personnel actions against them. To conclude otherwise would impose an impermissible burden on the rights granted federal workers by Congress and the Constitution, in this case under Title VII of the

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[17] The government in its brief asserts that the Assistant Attorney General's reference to the Perry and Falkowski litigation merely illustrates the extent of the personal feud between them. *See* Brief for Defendants-Appellees at 30 n.* The problem with this interpretation is that Ms. Falkowski's suit was not against Bertram Perry, but against the EEOC and her administrative supervisors, including one Lowell Perry, former chairman of the EEOC. *See* Appendix at 74 n.5.

Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (1976 & Supp. V. 1981).

2. *Disparate Treatment*

At the time DOJ rendered its decision against Ms. Falkowski, cases in which federal defendants had been denied government-provided legal counsel were apparently few and far between. During 1977 and 1978, both houses of Congress conducted hearings into Department of Justice practice and policy regarding retention of private legal counsel to defend government officials in civil lawsuits. These investigations were prompted by the Department's escalating expenditures for private legal counsel in individual-capacity suits that had burgeoned following the Senate Watergate and Intelligence Committee hearings. *See* STAFF OF SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, *supra*, at ix-xiv, 1.

A Senate committee staff report prepared following the 1977-78 hearings reviewed DOJ practice and policy in this area and concluded,

> Apparently, the Department's position is that it is in the public interest to defend any conduct which has not been held to be criminal.... The practical result is that, "however gross that conduct may seem to the layman," the Department has *not once* found the public interest to be independent grounds for refusing to represent an employee sued in his or her individual capacity when the Department has determined such employee was acting within the scope of his or her employment.

*Id.* at 6 (emphasis added).[18]

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[18] The committee staff's conclusion parallels the position expressed by the Attorney General in the explanatory materials accompanying the initial promulgation of DOJ regulations in

This finding hardly comports with the position taken by the Department in denying Ms. Falkowski's request for counsel, and raises a strong inference that her request was accorded disparate treatment in comparison to other applications recently processed by the Department. Because DOJ failed to explain this apparent incongruity in its treatment of similarly situated applicants, the District Court should have withheld final judgment on Ms. Falkowski's claim pending fuller development of the facts. *Cf. Contractors Transport Corp.* v. *United States*, 537 F.2d 1160, 1162 (4th Cir. 1976) (ICC order remanded for failure to explain agency's disparate treatment of similarly situated applicants).

After reviewing the reasons articulated in Assistant Attorney General Babcock's letter and considering the apparent contemporaneous practice of the Department of Justice, we conclude that the rationality of the Department's decision in Ms. Falkowski's case cannot be established absent further factual exploration. The District Court's grant of summary judgment on plaintiff's final claim was therefore inappropriate, and we accordingly reverse.[19]

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this area in January 1977. *See* Limitation for Representation of Federal Employees, 42 Fed. Reg. 5695 (1977) (Supplementary Information). For a discussion of these regulations, see *supra* note 13.

[19] As an alternative ground for upholding the District Court's grant of summary judgment on all three statutory claims, the defendant government agencies argue that the relief plaintiff seeks is in essence money damages, and that neither the APA nor Title VII provides for such damages against the United States, *See* Brief for Defendants-Appellees at 38-43 (citing 5 U.S.C. § 702 (1976) and 42 U.S.C. § 2000e-5(g) (1976)). They therefore contend that plaintiff's suit is barred by the doctrine of sovereign immunity.

We do not find it necessary to characterize the attorneys' fees plaintiff seeks as money damages or some other form of relief.

IV

On the basis of the filings and other documents before the District Court, summary judgment was properly granted with respect to plaintiff's first cause of action claiming reimbursement for her legal expenses in the *Perry* v. *Golub* case. As to her remaining two causes of action seeking representation and reimbursement in the *Perry* v. *Falkowski* litigation, we find that genuine issues of material fact remain in the case precluding summary judgment at this juncture. We therefore remand these two claims to the District Court for further proceedings in conformity with this opinion.

*It is so ordered.*

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Should plaintiff prevail at the liability stage under Title VII and the APA, the most appropriate remedy would not appear to be an order compelling agency reimbursement of the withheld payment, but a remand to the Department of Justice to reconsider plaintiff's request free of any biased input from EEOC and on the basis of rational decisionmaking criteria. Such relief is clearly equitable in nature and not money damages.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 81-1776

EVELYN FALKOWSKI, PLAINTIFF

*v.*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., DEFENDANTS

[Filed Mar. 4, 1982]

**MEMORANDUM**

Evelyn Falkowski brings this action against the Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ), arising out of their refusal to provide her with legal representation and reimbursement of legal fees for suits brought against her by a subordinate.[1] The defendants have

[1] Mrs. Falkowski's complaint requests that the United States be compelled "to pay her legal fees and provide her with legal defense in connection with two actions in which she was sued..." Mrs. Falkowski was first sued in 1975 in *Perry* v. *Golub*, No. 75-G-1476-S (N.D.Ala.) Not only does she admit tht EEOC attorneys represented her in that action, but the fact has been noted in two separate judicial opinions. *See Perry* v. *Golub*, 74 F.R.D. 360, 369 (N.D.Ala. 1976); *Falkowski* v. *Perry*, No. 76-G-0545-S, slip. op. at 16 (N.D.Ala. Feb. 17, 1981). Nevertheless, plaintiff claims she has been damaged by EEOC's failure to provide her with an adequate representation and defense in that action. To the extent that Mrs. Falkowski is attempting to state a cause of action under Title VII with regard to that suit, the action is time-barred because she did not properly pursue her administrative remedies by filing a formal complaint with the EEOC within 30 days, *see* 29 C.F.R.

moved to dismiss, or in the alternative, for summary judgment. Mrs. Falkowski has opposed the defendants' motion and has also moved to amend her complaint.[2]

Although it recites several statutory and constitutional bases for jurisdiction, Mrs. Falkowski's complaint states causes of action only under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* (1976 & Supp. III 1979) (Title VII), and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (1976 & Supp. III 1979) (APA). Because "the EEOC and the Department of Justice regularly and routinely defend federal employees who are acting within the scope of their employment in connection with lawsuits brought against said employees in connection with their employment," Mrs. Falkowski claims that "the failure of the EEOC to provide legal representation for plaintiff is . . . a result of discrimination." However, only DOJ may authorize legal representation or reimbursement of fees. *See* 28 U.S.C. § 517 (1976); 28 C.F.R. §§ 50.15, .16 (1980). The role of the EEOC is limited to recommending to the DOJ that representation be authorized and certifying that the employee in question was acting within the scope of his or her employment. 28 C.F.R. § 50.15(a)(1). Documents as well as an affidavit filed on behalf of the Government establish that the EEOC did recommend that representation be authorized and certified that Mrs. Falkowski was acting within the scope of her employment. Mrs. Falkowski presents no admissible evidence directly to the contrary and has failed to

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§ 1613.214(a)(1)(i) (1980). *E.g.*, *Milton* v. *Brown*, 471 F. Supp. 150, 152-53 (D.D.C. 1979), *modified on other grounds*, 645 F.2d 1070, 1074-77 (1981).

[2] Mrs. Falkowski's motion for leave to amend her complaint seeks to add the names of J. Clay Smith, Acting Chairman of the EEOC, and William French Smith, Attorney General of the United States, as additional defendants.

establish a prima facie case. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas* v. *Green*, 411 U.S. 792, 802 (1973).

The claim under the APA alleges that "the refusal of the EEOC and DOJ to provide plaintiff defense in these actions is arbitrary and capricious and a violation of their duty under law." As noted, the EEOC is without power to authorize legal defense and fully fulfilled its duty by providing DOJ with the required information. The issue of whether the DOJ's decision not to represent or reimburse Mrs. Falkowski is subject to judicial review need not be decided here. It is clear that the DOJ's decision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," so as to be in violation of the APA. 5 U.S.C. § 706(2)(A). In accordance with the applicable statute and regulation, the DOJ decided that it was not "in the interest of the United States" to provide legaal representation or reimbursement to Mrs. Falkowski. *See* 28 C.F.R. § 50.15(a)(2). *See also* 28 U.S.C. §§ 516-17. The reasons for this decision are set forth in then-Assistant Attorney General Barbara Allen Babcock's letter of May 17, 1979, to Mrs. Falkowski's private counsel:

> In light of the clearly personal nature of the dispute between Ms. Falkowski and Mr. Perry giving rise to the litigation, the tape recording by Ms. Falkowski of Mr. Perry's remarks in contravention of an internal EEOC directive, and the existence of separate actions by Ms. Falkowski and Mr. Perry challenging proposed personnel actions against them, I do not believe it is in the interest of tthe United States to reimburse Ms. Falkowski for her legal costs. Accordingly, pursuant to 28 C.F.R. § 50.15(a)(2), I am denying Ms. Falkowski's request.

In view of the foregoing, defendants' motion for summary judgment is granted. Since the proposed amendment of Mrs. Falkowski's complaint would have no effect on the foregoing determination, that motion is denied.

An appropriate order follows.

/s/ John Lewis Smith, Jr.

United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 81-1776

EVELYN FALKOWSKI, PLAINTIFF

*v.*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., DEFENDANTS

[Filed Mar. 4, 1983

**ORDER**

Upon consideraton of defendant's motion for dismissal or, in the alternative, for summary judgment, plaintiff's opposition, plaintiff's motion for leave to amend the complaint, defendants' reply to plaintiff's opposition, plaintiff's surrebuttal, the arguments of counsel and the entire record, it is by the Court this 3rd day of March 1982

ORDERED that defendants' motion for summary judgment is granted, and it is further

ORDERED that plaintiff's motion to amend the complaint is denied.

/s/ _____
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1983

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Civil Action No. 81-01776

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EVELYN FALKOWSKI, APPELLANT

*v.*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

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[Filed Jan. 12, 1984]

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BEFORE: ROBINSON, *Chief Judge;* WILKEY, *Circuit Judge* and MCGOWAN, *Senior Circuit Judge*

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**ORDER**

On consideration of the Petition for Rehearing of Appellees, filed November 28, 1983, it is

ORDERED by the Court that the aforesaid Petition is denied.

*Per Curiam*

For The Court:

GEORGE A. FISHER,
*Clerk*

By: Robert A. Bonner

ROBERT A. BONNER
*Chief Deputy Clerk*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1983

No. 82-1446

EVELYN FALKOWSKI, APPELLANT

*v.*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

[Filed Jan. 12, 1984]

BEFORE: ROBINSON, *Chief Judge;* WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, *Circuit Judges*

**ORDER**

Appellee's Suggestion for Rehearing *en banc*, filed November 28, 1983, has been circulated to the full Court. A majority of the judges in regular active service has not voted in favor of the suggestion. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the suggestion is denied.

*Per Curiam*

For The Court:

GEORGE A. FISHER, *Clerk*

By: Robert A. Bonner
ROBERT A. BONNER
*Chief Deputy Clerk*

Circuit Judges Bork, Scalia and Starr would grant the suggestion.

A statement by Circuit Judge Starr, joined in by Circuit Judge Scalia, is attached.

No. 82-1446

EVELYN FALKOWSKI

*v.*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

In the case before us, a panel of this court has concluded that judicial review under the Administrative Procedure Act is appropriate with respect to Executive Branch decisions to authorize legal representation of government employees in suits brought against them. With all respect, this decision seems quite plainly wrong. But right or wrong, the panel's opinion treats in summary fashion[1] an issue of such grave importance under bedrock principles of separation-of-powers that

[1] Before the panel and in its petition for rehearing, the Government argued that its decision not to provide legal representation to the plaintiff was "committed to agency discretion" under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2)(1976) and was, therefore, unreviewable. The panel's opinion, after devoting fifteen pages to a recounting of the bizarre history of the courtroom activities of an extraordinarily litigation-prone plaintiff, devotes exactly one footnote to the dispatch of this contention. In articulating by way of footnote why the Attorney General's decision is not unreviewable under the analysis set forth in *Natural Resources Defense Council, Inc.* v. *SEC*, 606 F.2d 1031, 1043-47 (D.C. Cir. 1979), the opinion cites a solitary case in support of its conclusion. That case, from the 7th Circuit, had to do with a discretionary decision by the Attorney General under the Nation's immigration laws to suspend deportation of an alien. That setting is quite plainly a far cry from the determination whether to afford legal representation to an incumbent federal employee—a situation that triggers an entirely different set of both private interests and public policy considerations.

the case clearly warrants careful consideration by the entire court. I therefore respectfully dissent from the court's declination of the suggestion to rehear the case *en banc*.

The statutory provision in question, 8 U.S.C. § 517, authorizes the Attorney General to bring legal actions, to intervene in actions, or to file amicus briefs in actions filed by parties other than the United States in courts around the nation. This range of choices by the Attorney General is guided solely by the broad standard, "to attend to the interests of the United States."[2] In my view a court cannot appropriately demand reasons for litigation decisions statutorily entrusted to the Attorney General or his representatives to evaluate judicially whether those decisions, in the panel's words, "make sense" under the APA. Slip. op. at 21 n.16. Separation-of-powers doctrines, not to mention the clear language of the APA, are deeply implicated by judicial evaluations of reasons undergirding the Executive's determinations either to take or to refrain from taking actions before this branch. As the Court said in *Buckley* v. *Valeo:*

> The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed." Art. II, § 3.

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[2] Section 517 provides:

> The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

424 U.S. at 138. Just as the Executive's "discretionary power to seek judicial relief" is preeminently separate from legislative powers, so also it is preeminently separate from judicial powers. The decision not to prosecute has been the archetype of unreviewable executive action. There is no reason in logic or precedent why the decision not to litigate in civil matters should be treated differently.

In wading into this formidable thicket, courts will invariably and needlessly face grave difficulties in evaluating the Executive's articulated reasons against a standard as broad as the "interests of the United States." This intrusion by the Article III branch into the discretionary judgments of a coordinate branch is particularly sensitive in the context of reviewing litigation decisions by the Executive, where various considerations of policy, tactics and the allocation of limited resources require complex and delicate balancing. As the Supreme Court has stated in another context in which it found judicial review inappropriate, "[t]hese are matters on which experts may disagree; they involve nice issues of judgment and choice ... which require the exercise of informed discretion." *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317 (1958). The difficulties inherent in judicial evaluation of Executive Branch litigation determinations will be exacerbated where, as here, the courts will not, by virtue of the "deliberative process' privilege, have access to all the information in the hands of the Executive in reaching its decision.

In my view judicial review becomes no more appropriate when the protection of the "interests of the United States" takes the form of a decision to defend—or not to defend—an employee in a suit brought against him.[3] The same broad statutory language is be-

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[3] Indeed, the panel does not offer any rationale limiting judicial review of actions by the Attorney General under section 517 to decisions to represent government employees.

ing interpreted. The same separation-of-powers concerns and difficulties of evaluation are powerfully extant. And, critically, the Department of Justice regulations governing employee representation do not in any way surrender or significantly cabin the discretion conferred by statute upon the Executive. The regulations do not grant employees any entitlement to representation; to the contrary, the regulations merely state that the government "may" provide representation. 28 C.F.R. § 50.15. Indeed, by their terms the regulations provide that representation will not be provided when it is "not in the interest of the United States" to do so. *Id.* Unlike the panel, I see no warrant for judicial review to safeguard a set of particularized interests when the governing statute itself confers absolutely no weight upon those interests.

Inasmuch as the panel's decision repesents a significant and unjustified intrusion into the prerogatives of a sister branch and does violence to the particular statutory standard governing judicial review, I respectfully dissent.

## APPENDIX D

## STATUTES AND REGULATIONS

5 U.S.C. 701(a) provides in pertinent part:

> This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

28 U.S.C. 516 provides:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

28 U.S.C. 517 provides:

> The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

28 U.S.C. 518 provides:

> (a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the United States Claims Court or in the United States Court of Appeals for the Federal Circuit and in the Court of International Trade in which the United states is interested.
>
> (b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.

28 U.S.C. 519 provides:

> Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

28 C.F.R. 50.15 provides:

> (a) Under the procedures set forth below, a federal employee (hereby defined to include present and former Federal officials and employees) may be provided representation in civil and Congressional proceedings and in state criminal proceedings in which he is sued, subpoenaed, or charged in his individual capacity, not covered by § 15.1 of this chapter, when the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment and providing representation would otherwise be in the interest of the United States. No special form of request for representation is required when it is clear from the pleadings in a case that the employee is being sued solely in his official capacity and only equitable relief is sought. (See USAM 4-13.000)
>
> (1) When an employee believes he is entitled to representation by the Department of Justice in a proceeding, he must submit forthwith a written request for that representation, together with all process and pleadings served upon him, to his immediate supervisor or whomever is designated by the head of his department or agency. Unless the employee's employing federal agency concludes that representation is clearly unwarranted, it shall submit, in a timely manner, to the Civil Division or other appropriate litigating division (Antitrust, Civil Rights, Criminal, Land and Natural Resources or the Tax Division), a statement con-

taining its findings as to whether the employee was acting within the scope of his employment and its recommendation for or against providing representation. The statement should be accompanied by all available factual information. In emergency situations the litigating division may initiate conditional representation after a telephone request from the appropriate official of the employing agency. In such cases, the written request and appropriate documentation must be subsequently provided.

(2) Upon receipt of the individual's request for counsel, the litigating division shall determine whether the employee's actions reasonably appear to have been performed within the scope of his employment and whether providing representation would be in the interest of the United States. In circumstances where considerations of professional ethics prohibit direct review of the facts by attorneys of the litigating division (e.g. because of the possible existence of inter-defendant conflicts) the litigating division may delegate the fact-finding aspects of this function to other components of the Department or to a private attorney at federal expenses.

(3) Attorneys employed by any component of the Department of Justice who participate in any process utilized for the purpose of determining whether the Department should provide representation to a federal employee, undertake a full and traditional attorney-client relationship with the employee with respect to application of the attorney-client privilege. If representation is authorized, Justice Department attorneys who represent an employee under this section also undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege. Any adverse information communicated by the client-employee to an attorney during the course of such attorney-client relationship shall not be disclosed to anyone, either inside or outside the Department,

other than attorneys responsible for representation of the employee unless such disclosure is authorized by the employee. Such adverse information shall continue to be fully protected whether or not representation is provided, and even though representation may be denied or discontinued. The extent, if any, to which attorneys employed by an agency other than the Department of Justice undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege, either for purposes of determining whether representation should be provided or to assist Justice Department attorneys in representing the employee, shall be determined by the agency employing the attorneys.

(4) Representation is not available in federal criminal proceedings. In other proceedings for which representation is sought, where there appears to exist the possibility of a federal criminal investigation or indictment relating to the same subject matter, the litigating division shall contact a designated official in the Criminal, Civil Rights or Tax Division or other prosecutive authority within the Department (hereinafter "prosecuting division") to determine whether the employee is either a subject of a federal criminal investigation or a defendant in a federal criminal case. An employee is the subject of an investigation if, in addition to being circumstantially implicated by having the appropriate responsibilities at the appropriate time, there is some evidence of his specific participation in a crime.

(5) If a prosecuting division of the Department indicates that the employee is not the subject of a criminal investigation concerning the act or acts for which he seeks representation, then representation may be provided if otherwise permissible under the provisions of this section. Similarly, if the prosecuting division indicates that there is an ongoing investigation, but into a matter unrelated to

that for which representation has been requested, then representation may be provided.

(6) If the prosecuting division indicates that the employee is the subject of a federal criminal investigation concerning the act or acts for which he seeks representation, the litigating division shall inform the employee that no representation by Justice Department attorneys will be provided in the related civil, congressional, or state criminal proceeding. In such a case, however, the litigating division, in its discretion, may provide a private attorney to the employee at federal expense under the procedures of § 50.16 provided no decision has been made to seek an indictment or file an information against the employee.

(7) In any case where it is determined that Department of Justice attorneys will represent a federal employee the employee must be notified of his right to retain private counsel at his own expense. If he elects representation by Department of Justice attorneys, the employee and his agency shall be promptly informed.

(i) That in actions where the United States, any agency, or any officer thereof in his official capacity is also named as a defendant, the Department of Justice is required by law to represent the United States and/or such agency or officer and will assert all appropriate legal positions and defenses on behalf of such agency, officer and/or the United States.

(ii) That the Department of Justice will not assert any legal position or defense on behalf of any employee sued in his individual capacity which is deemed not to be in the interest of the United States.

(iii) Where appropriate, that neither the Department of Justice nor any agency of the United States Government is obligated to pay or to indemnify the defendant employee for any judgment for

money damages which may be rendered against such employee;

(iv) That any appeal by Department of Justice attorneys from an adverse ruling or judgment against the employee may only be taken upon the discretionary approval of the Solicitor General, but the employee-defendant may pursue an appeal at his own expense whenever the Solicitor General declines to authorize an appeal and private counsel is not provided at federal expense under the procedures of § 50.16; and

(v) That while no conflict appears to exist at the time representation is tendered which would preclude making all arguments necessary to the adequate defense of the employee, if such conflict should arise in the future the employee will be promptly advised and steps will be taken to resolve the conflict as indicated by paragraphs (a)(6), (a)(9) and (a)(10) of this section, and by § 50.16.

(8) If a determination not to provide representation is made, the litigating division shall inform the agency and/or the employee of the determination.

(9) If conflicts exist between the legal and factual positions of various employees in the same case which make it inappropriate for a single attorney to represent them all, the employees may be separated into as many compatible groups as is necessary to resolve the conflict problem and each group may be provided with separate representation. Circumstances may make it advisable that private representation be provided to all conflicting groups and that direct Justice Department representation be withheld so as not to prejudice particular defendants. In such situations, the procedures of § 50.16 will apply.

(10) Whenever the Solicitor General declines to authorize further appellate review or the Department attorney assigned to represent an employee becomes aware that the representation of the employee could involve the assertion of a position that

conflicts with the interests of the United States, the attorney shall fully advise the employee of the decision not to appeal or the nature, extent, and protential consequences of the conflict. The attorney shall also determine, after consultation with his supervisor (and, if appropriate, with the litigating division) whether the assertion of the position or appellate review is necessary to the adequate representation of the employee and

(i) If it is determined that the assertion of the position or appeal is not necessary to the adequate representation of the employee, and if the employee knowingly agrees to forego appeal or to waive the assertion of that position, governmental representation may be provided or continued; or

(ii) If the employee does not consent to forego appeal or waive the assertion of the position, or if it is determined that an appeal or assertion of the position is necessary to the adequate representation of the employee, a Justice Department lawyer may not provide or continue to provide the representation; and

(iii) In appropriate cases arising under paragraph (a)(10)(ii) of this section, a private attorney may be provided at federal expense under the procedures of § 50.16.

(11) Once undertaken, representation of a federal employee under this subsection will continue until either all appropriate proceedings, including applicable appellate procedures approved by the Solicitor General, have ended, or until any of the bases for declining or withdrawing from representation set forth in this section is found to exist, including without limitation the basis that representation is not in the interest of the United States. If representation is discontinued for any reason, the representing Department attorney on the case will seek to withdraw but will take all reasonable steps to avoid prejudice to the employee.

(b) Representation is not available to a federal employee whenever;

(1) The representation requested is in connection with a federal criminal proceeding;

(2) The conduct with regard to which the employee desires representation does not reasonably appear to have been performed within the scope of his employment with the federal government;

(3) It is otherwise determined by the Department that it is not in the interest of the United States to provide representation to the employee.

28 C.F.R. 50.16 provides:

(a) Representation by private counsel at federal expense is subject to the availability of funds and may be provided to a federal employee only in the instances described in § 50.15(a)(6), (9) and (10), and in appropriate circumstances, for the purposes set forth in § 50.15(a)(2).

(b) To ensure uniformity in retention procedures among the litigating divisions, the Civil Division shall be responsible for establishing procedures for the retention of private counsel including the setting of fee schedules. In all instances where a litigating division decides to retain private counsel under § 50.16, the Civil Division shall be consulted before the retention is undertaken.

(c) Where private counsel is provided, the following procedures shall apply;

(1) While the Department of Justice will generally refer to the employee's choice of counsel the Department must approve in advance any private counsel to be retained under this section. Where national security interests may be involved, the Department of Justice will consult with the agency employing the federal defendant seeking representation.

(2) Federal payments to private counsel for an employee will cease if the private counsel violates any of the terms of the retention agreement or the Department of Justice.

(i) Decides to seek an indictment of, or to file an information against, that employee on a federal criminal charge relating to the conduct concerning which representation was undertaken;

(ii) Determines that the employee's actions do not reasonably appear to have been performed within the scope of his employment;

(iii) Resolves any conflict described herein and tenders representation by Department of Justice attorneys;

(iv) Determines that continued representation is not in the interest of the United States;

(v) Terminates the retainer with the concurrence of the employee-client for any reason.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

April 1, 1985

Mr. John D. Grad
108 North Columbus Street
P.O. Box 1226
Alexandria, VA 22313

Re: United States Department of Justice,
v. Evelyn Falkowski
No. 83-2034

Dear Mr. Grad:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Circuit Court of Appeals for the District of Columbia Circuit for further consideration in light of Heckler v. Chaney, 470 U.S. ___ (1985).

Very truly yours,

Alexander L. Stevas, Clerk

Alexander L. Stevas

**Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.**

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 82-1446

EVELYN FALKOWSKI, APPELLANT

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.

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Appeal from the United States District Court
for the District of Columbia
(D.C. Civil No. 81-01776)

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*On Remand from the Supreme Court*
*of the United States*

Filed June 21, 1985

Before ROBINSON, *Chief Judge*, MCGOWAN and WILKEY,* *Senior Circuit Judges.*

Opinion for the Court filed by *Senior Circuit Judge* MCGOWAN.

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* Sr. Judge Wilkey did not participate in this case on remand.

**Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.**

McGOWAN, *Senior Circuit Judge*: In *Falkowski v. Equal Employment Opportunity Commission*, 719 F.2d 470 (D.C. Cir. 1983), this court reversed part of the District Court's grant of summary judgment to the government on claims concerning the representation *vel non* provided to plaintiff-appellant by the government in lawsuits stemming from her employment with the Equal Employment Opportunity Commission (EEOC). The Supreme Court has vacated our judgment in *Falkowski* and remanded the case to us for further consideration in light of *Heckler v. Chaney*, 105 S. Ct. 1649 (1985). After discussing the facts and holding of *Chaney*, we hold that only one of the three causes of action brought before the District Court by the plaintiff remains viable.

I

*Heckler v. Chaney* involves the reviewability of a decision by the Food and Drug Administration (FDA) not to enforce the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.* (1982), against states using lethal injections as capital punishment. The prisoner-plaintiffs claimed that the drugs had not been tested for the purposes they were to be used, and that allowing untrained personnel to administer the drugs was likely to result in excessive suffering. The plaintiffs requested that the FDA take the appropriate enforcement action. 105 S. Ct. at 1652.

The Supreme Court ruled that the FDA's decision was unreviewable under the APA because decisions by an agency not to prosecute are historically within its absolute discretion and because there was "no law to apply" limiting this discretion.

The Court listed a number of factors that go into an agency's decision not to enforce a statute, and stated that an "agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." 105 S. Ct. at 1656. The Court also

noted that the decision not to enforce is similar to the decision not to prosecute, a decision "long . . . regarded as the special province of the Executive Branch." *Id.* These factors are justification for a presumption of unreviewability of decisions not to take enforcement action.

That presumption of unreviewability may, however, "be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* (footnote omitted). The *Chaney* Court gave *Dunlop v. Bachowski*, 421 U.S. 560 (1975), as an example of a case where the presumption was overcome by the statute's substantive guidelines. 105 S. Ct. at 1657. In *Dunlop*, the relevant statute directed that, upon filing of a complaint by a union member that a union election was tainted, "[t]he Secretary [of Labor] shall investigate such complaint and, if he finds probable cause to believe that a violation . . . has occurred . . . he shall bring a civil action" against the alleged violator. 29 U.S.C. § 482(b) (1982).

In *Chaney* itself, in contrast, the language at issue was the general provision on enforcement of all parts of the relevant statute, which stated simply that "[t]he Secretary [of Health and Human Services] is authorized to conduct examination and investigations," 21 U.S.C. § 372 (a) (1982), and a handful of provisions setting forth specific remedies but no specific standard as to when their use is proper. 105 S. Ct. at 1658. The Court dismissed a "policy statement" of the FDA, upon which the Court of Appeals had relied heavily, as of questionable authority and in conflict with an agency rule. *Id.*

Taking all these factors into consideration, the *Chaney* Court held that the FDA's decision not to enforce the statute was unreviewable:

> The FDA's decision not to take the enforcement actions requested by respondents is therefore not subject to judicial review under the APA. The general exception to reviewability provided by [5 U.S.C.] § 701(a)(2) for action "committed to agency dis-

> cretion" remains a narrow one, see *Overton Park*, 401 U.S. 402 . . . (1971), but within that exception are included agency refusals to institute investigative or enforcement proceedings, unless Congress has indicated otherwise. In so holding, we essentially leave to Congress, and not to the courts, the decision as to whether an agency's refusal to institute proceedings should be judicially reviewable. No colorable claim is made in this case that the agency's refusal to institute proceedings violated any constitutional rights of respondents, and we do not address the issue that would be raised in such a case.

105 S. Ct. at 1659.

II

The EEOC can recommend to the Department of Justice (DoJ) that one of its employees be represented by the government in a lawsuit involving the employee. The Department of Justice then makes the final decision as to whether or not to provide representation. *See* 28 U.S.C. § 516 (1982).

Ms. Falkowski brought three causes of action before the District Court that accused the government of illegal action in connection with its decisions regarding the representation of Ms. Falkowski, who became embroiled in a wide-ranging series of lawsuits as a result of internecine disputes with her fellow employees. *See generally Falkowski*, 719 F.2d at 472-76 (discussing facts and procedural history of case).

The first cause of action involved the lawsuit styled *Perry v. Golub*. We affirmed the District Court's dismissal of this cause of action. *Id.* at 478-79. The second cause of action was against the EEOC for its role in the suit styled *Perry v. Falkowski*. We reversed the District Court's grant of summary judgment with respect to this cause of action. *Id.* at 479-80. The third cause of action was against DoJ for its role in *Perry v. Falkowski*. We reversed the District Court's grant of summary judgment with respect to this cause as well. *Id.* at 480-83.

*Chaney* does not affect our decision with respect to the first or second causes of action. On these issues, we therefore allow our earlier rulings to stand. With respect to the third cause of action, *Chaney* requires us to change our earlier course and affirm the District Court's dismissal.

A. *Plaintiff's First Cause of Action*

In her first cause of action, Ms. Falkowski accused the EEOC of discriminatory and retaliatory denial of adequate government legal representation in *Perry v. Golub*, one of the suits generated by events occurring while Ms. Falkowski was employed by the EEOC. 719 F.2d at 477. We held that this cause of action was collaterally estopped. *Chaney* obviously does not speak to this issue. We reiterate our affirmance of the District Court's dismissal of this cause of action, for the reasons set forth in our earlier opinion. 719 F.2d at 478-79.

B. *Plaintiff's Second Cause of Action*

Ms. Falkowski's second cause of action involved the EEOC's actions with respect to representation for Ms. Falkowski in the suit of *Perry v. Falkowski*, another of the suits arising from events occurring at the time of Ms. Falkowski's employment with the EEOC. The EEOC in fact recommended that DoJ represent Ms. Falkowski, but not until its delay in doing so had forced Ms. Falkowski to retain private counsel to respond to the complaint against her before the deadline for filing an answer had passed. 719 F.2d at 476.

Ms. Falkowski accused the EEOC of intentionally mishandling her recommendation so as to undercut the force of its formal favorable recommendation, and of being motivated to do so by discrimination prohibited by Title VII. *Id.* at 480. We acknowledged that Ms. Falkowski faced a heavy evidentiary burden in proving her case, but held that the EEOC's three-month delay in acting on Ms. Falkowski's request could indicate discriminatory

animus on the part of the EEOC, and thus that the District Court was incorrect to grant summary judgment for the EEOC. *Id.*

This cause of action does not involve the challenge of an agency's decision not to take action as arbitrary and capricious. Ms. Falkowski does not challenge the agency's eventual decision; indeed, the EEOC eventually took the action requested by Ms. Falkowski. The issue is rather whether the EEOC's delay in taking that action was a result of discrimination prohibited by Title VII. *Chaney* involved no such claims of discriminatory animus, and explicitly reserved the question of whether agency inaction was unreviewable when constitutional claims were involved. 105 S. Ct. at 1659. For all these reasons, we believe that *Chaney* does not prohibit Ms. Falkowski from proceeding with her second cause of action. For the reasons stated in our earlier opinion in this case, then, we hold that Ms. Falkowski may go forward with her second cause of action. *See* 719 F.2d at 480.

C. *Plaintiff's Third Cause of Action*

In her third cause of action, Ms. Falkowski accused the Department of Justice of arbitrarily and capriciously denying her request for counsel in *Perry v. Falkowski*. Under the standard set forth in *Heckler v. Chaney*, the decision by DoJ not to act is unreviewable.

In our earlier opinion in this case, we found unpersuasive the government's contention that its decision was unreviewable. *See* 719 F.2d at 481 n.16. The government advanced several related grounds for its argument. It argued that the non-mandatory language of the relevant regulations gave DoJ discretion in deciding whether DoJ would represent, or pay for the private representation of, governmental employees. It asserted that the diversion of DoJ's resources to defending against claims like Ms. Falkowski's would reduce its effectiveness in its congressionally assigned mission of defending other federal

employees. It pointed to the myriad factors bearing upon the decision to provide representation, and argued that DoJ is better suited to such a task than are the courts. We turned away each argument as insufficiently weighty to overcome the usual presumption of reviewability.

In light of *Chaney*, however, we now hold that DoJ's contentions are sufficient to overcome the presumption of reviewability. The decision to refuse to provide legal representation is admittedly less similar to the historically protected exercise of prosecutorial discretion than was the decision at issue in *Chaney* to refuse to bring an action to enforce a statute. Equally important to the Supreme Court's decision, however, were the superiority of the agency as a decisionmaker on the questions at issue and the absence of any congressional pronouncements cabining the agency's discretion. Because of the applicability of these two latter grounds to this case, DoJ's action is unreviewable.

Deciding whether to provide counsel for a governmental employee is in many ways analogous to deciding whether to enforce a statute. Congress granted HHS broad, discretionary authority to enforce the Federal Food, Drug, and Cosmetic Act. Congress gave DoJ broad, discretionary authority to provide federal employees with private counsel. *See* 719 F.2d at 477 n.13. Both the decision in *Chaney* not to enforce the statute at issue there and the decision here not to provide counsel must therefore occur in the absence of explicit congressional guidance. In addition, both decisions involve the allocation of an agency's scarce legal resources, decisions better suited to the expertise of the agency than of the courts. We hold that, on the facts of this particular case, the similarities between *Chaney* and this case outweigh the differences. We therefore affirm the District Court's dismissal of Ms. Falkowski's third cause of action, on the grounds that the DoJ's decision not to provide her with counsel was within the agency's unreviewable discretion.

*So Ordered.*

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 82-1446

EVELYN FALKOWSKI, APPELLANT

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*

---

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 81-01776)

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On Petition for Rehearing

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Filed February 18, 1986

*Hope Eastman* was on appellant's petition for rehearing.

Before ROBINSON, *Chief Judge*, GINSBURG, *Circuit Judge*, and MCGOWAN, *Senior Circuit Judge*.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Opinion Per Curiam.

PER CURIAM: On remand of this case from the Supreme Court,[1] we affirmed in part and reversed in part the judgment of the District Court under challenge.[2] We analyzed appellant's third cause of action in light of the Court's decision in *Heckler* v. *Chaney*,[3] and held that the refusal of the Department of Justice to provide appellant with counsel fell within the " 'very narrow' " [4] exception to the presumption of reviewability carved out by Section 701(a)(2) of the Administrative Procedure Act [5] for action committed to agency discretion.[6] We see no reason to retreat from that view, and accordingly deny the petition for rehearing filed by petitioner and supported by amicus curiae.

Congress empowered the Attorney General to send a lawyer into court "to attend to the interests of the United States." [7] Congress has provided no further guide to exercise of this authority, however, and the Attorney General has imposed no self-restraint through regulation [8] or practice.[9] We have previously recognized both the entirely

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[1] See *United States Dep't of Justice* v. *Falkowski*, —— U.S. ——, 105 S.Ct. 1860, 85 L.Ed.2d 155 (1985).

[2] See *Falkowski* v. *Equal Employment Opportunity Comm'n*, —— U.S.App.D.C. ——, 764 F.2d 907 (1985).

[3] —— U.S. ——, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985).

[4] *Id.* at ——, 105 S.Ct. at 1655, 84 L.Ed.2d at 723, quoting *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 411, 91 S.Ct. 814, 820, 28 L.Ed.2d 136, 150 (1971).

[5] 5 U.S.C. § 701(a)(2) (1982).

[6] *Falkowski* v. *Equal Employment Opportunity Comm'n*, *supra* note 2, —— U.S.App.D.C. at ——, 764 F.2d at 910-911.

[7] 28 U.S.C. § 517 (1982).

[8] See 28 C.F.R. §§ 50.15-50.16 (1981).

[9] Appellant and amicus assert that the Deparement of Justice always provides counsel to federal employees sued on

discretionary nature of the power[10] and the breadth of that discretion.[11] As we noted more definitively in our earlier opinion,[12] neither the statute, nor any regulation, nor any administrative practice cabins this discretion or furnishes any standard by which to review the Attorney General's determinations in this area.[13]

We further observe that the Attorney General has long possessed the power to decide whether to provide counsel for a federal employee. This power dates back at least to the establishment of the Department of Justice in 1870,[14] and agents of the Attorney General have appeared

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account of action taken or omitted in the course of their employment. We have observed in this very litigation, *Falkowski* v. *Equal Employment Opportunity Comm'n*, 231 U.S.App.D.C. 226, 719 F.2d 470 (1983), that "cases in which federal defendants had been denied government-provided legal counsel were apparently few and far between." *Id.* at 238, 719 F.2d at 482. We note, however, that in at least one recent case, *Ryan* v. *United States*, No. 3779C (Ct. Cl. May 1, 1981), the court rejected a claim not dissimilar to appellant's. In *Ryan*, the Department refused reimbursement of attorneys' fees incurred by an officer of the Federal Bureau of Investigation in the course of his subpoenaed appearance before a grand jury investigating FBI activities.

[10] *Expeditions Unlimited Aquatic Enters.* v. *Smithsonian Inst.*, 184 U.S.App.D.C. 397, 400 n.7, 566 F.2d 289, 292 n.7 (*en banc* 1977), *cert. denied*, 438 U.S. 915, 98 S.Ct. 3144, 57 L.Ed.2d 1160 (1978).

[11] *Booth* v. *Fletcher*, 69 App.D.C. 351, 356-357 & n.20, 101 F.2d 676, 681-682 & n.20 (1938), *cert. denied*, 307 U.S. 628, 59 S.Ct. 835, 83 L.Ed. 1511 (1939).

[12] —— U.S.App.D.C. at ——, 764 F.2d at 911.

[13] See *Heckler* v. *Chaney*, *supra* note 3, —— U.S. at ——, 105 S.Ct. at 1655, 84 L.Ed.2d at 723; *Citizens to Preserve Overton Park* v. *Volpe*, *supra* note 4, 401 U.S. at 410, 91 S.Ct. at 821, 28 L.Ed.2d at 150.

[14] See Act of June 22, 1870, ch. 150, § 17, 16 Stat. 162, 164 (historically codified at Rev. Stat. tit. 8, § 367 (2d ed. 1878) in substantially the present form).

in court to defend federal employees at least since 1821.[15] Although administrative decisions on provision of an attorney may not have enjoyed the deference traditionally commanded by those on prosecutions and enforcement actions,[16] we certainly can say that in each of these situations, the Attorney General acts in the context of a lengthy history of discretionary authority.

We face in this case no colorable claim that the Department's refusal to furnish appellant with a lawyer transgresses any constitutionally protected right, and we intimate no view as to the outcome proper were that the case.[17] The record does not reveal, as appellant apparently would have us find, that she has been treated so dissimilarly from similarly situated employees as to implicate constitutional concerns.[18] We are loath to suggest that the Attorney General may not, in exercising his discretion, consider how blameworthy or litigation-prone the employee seeking representation may be. Assistance to employees in these categories can drain the limited personnel and financial resources of the Department of Justice not only directly, by increasing the burden of repre-

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[15] See *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 218, 5 L.Ed. 242, 245 (1821); see also *Booth* v. *Fletcher*, *supra* note 11, 69 App.D.C. at 356-357 & n.20, 101 F.2d at 681-682 & n.20.

[16] Neither appellant, nor amicus, nor our independent research indicates, however, any failure to accord such deference to the Attorney General's discretion to afford representation. Apparently, the exercise of this discretion has never been successfully challenged.

[17] Compare *Heckler* v. *Chaney*, *supra* note 3, —— U.S. at ——, 105 S.Ct. at 1659, 84 L.Ed.2d at 728.

[18] See generally *Ryan* v. *United States*, *supra* note 9; see also Letter from Assistant Attorney General Barbara Allen Babcock to EEOC General Counsel Abner W. Sibal, Nov. 3, 1978, Appendix 112 (stating that the primary reason for refusing to afford representation was the disinclination of the Department of Justice to participate in the funding of the "latest arena" for the protracted and bitter dispute between appellant and Bertram Perry).

sentation, but also indirectly, by requiring the defense of a spate of suits seeking representation notwithstanding that the Attorney General has found it to be incompatible with the interests of the United States.[19]

We emphasize that we do not read *Heckler* v. *Chaney*[20] to require us to shift the general presumption of reviewability[21] to one of unreviewability for the purposes of this case, and we have not done so.[22] As we have heretofore had occasion to observe,[23] *Chaney* "concerned an agency's *refusal to take enforcement action under a statute*," and "[h]ence, judicial review was inappropriate because of the lack of statutory guidelines and the longstanding tradition of absolute discretion in prosecutorial decisionmaking."[24] Here we conclude simply that some of the factors that led the *Chaney* Court to establish a presumption of unreviewability for agency enforcement decisions convince us that any presumption of reviewability of representation decisions has been rebutted.

*Petition for rehearing denied.*

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[19] See *Heckler* v. *Chaney*, *supra* note 3, —— U.S. at ——, 105 S.Ct. at 1656, 84 L.Ed.2d at 724; *Falkowski* v. *Equal Employment Opportunity Comm'n*, *supra* note 2, —— U.S. App.D.C. at ——, 764 F.2d at 911.

[20] *Supra* note 3.

[21] See note 4 *supra* and accompanying text.

[22] See *Falkowski* v. *Equal Employment Opportunity Comm'n* *supra* note 2, —— U.S.App.D.C. at ——, 764 F.2d at 911.

[23] *California Human Dev. Corp.* v. *Brock*, —— U.S.App. D.C. ——, —— n.28, 762 F.2d 1044, 1048 n.28 (1985).

[24] *Id.* (emphasis in original); see also *Robbins* v. *Reagan*, Nos. 85-5864, 85-5943 (D.C. Cir. Dec. 10, 1985) at 13-17 ("[Chaney's] requirement of an amplified level of discernible standards controlling the agency's discretion is not applied . . . where agency action not analogous to enforcement decisions is involved"); *Cardoza* v. *Commodities Futures Trading Comm'n*, 768 F.2d 1542, 1549 (7th Cir. 1985) (reading *Chaney* as not requiring application of a presumption of unreviewability to a situation not involving an agency nonenforcement decision).

* * *

(p. 9) The committee staff and the two C.R.S. legal memoranda start from the premise that even if sections 516 and 517 support the Department statutory "interest in litigation involving Federal employees, they are not dispositive of whether the Department has statutory authority to retain private legal counsel to represent that interest. In fact the legislative history of 5 U.S.C. 3106, 28 U.S.C. 515, and 28 U.S.C. 543, cited extensively in these legal memoranda, demonstrates that the Department has statutory authority to retain private counsel only if such counsel is under the control and supervision of the Attorney General.

Specifically, section 3106 contains a general prohibition against any Department—including the Department of Justice—employing "an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested * * *, except as otherwise authorized by law * * *."

Neither sections 516 or 517 can be construed to provide this authorization to retain private counsel as neither makes any reference to private counsel involvement in litigation in which the United States is interested. Indeed section 516 refers only to "officers of the Department of Justice, under the direction of the Attorney General" and section 517 refers only to the "Solicitor General or any officer of the Department of Justice * * *." Furthermore, section 519 makes it clear that "the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party * * *."

The two sections in title 28 which do satisfy the requirement in 5 U.S.C. 3106 both explicitly empower the Attorney General to retain "special appointed" counsel. They are sections 515(b) and 543. . . .

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(p. 108) [Attachment to Anderson memo of March 21, 1977 (exhibit 10).]

(SEAL)

UNITED STATES DEPARTMENT OF JUSTICE

Washington, D.C. 20530

# REPORT TO THE ASSISTANT ATTORNEY GENERAL ON REPRESENTATION OF GOVERNMENT EMPLOYEES IN CIVIL LITIGATION

Prepared By:

REPRESENTATION COMMITTEE
OF THE
GENERAL LITIGATION SECTION
CIVIL DIVISION

March 21, 1977

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(p. 111) REPORT TO THE ASSISTANT ATTORNEY GENERAL ON REPRESENTATION OF GOVERNMENT EMPLOYEES IN CIVIL LITIGATION

This report is addressed to the problems presently facing the Department of Justice in connection with requests by current and former federal employees for Justice Department representation in civil proceedings at the state and federal levels. The areas examined by the memorandum include:

(1) The effect that pending federal criminal investigations and inter-defendant conflicts will have on extending any form of government-financed representation to civil defendants who are subjects of the criminal investigations;

(2) The types of representation approaches that may be taken to avoid conflict of interest problems resulting from both criminal investigations concerning the subject matter of the civil litigation, and conflicts between multiple defendants requesting representation;

(3) Possible methods of reducing the cost of providing private counsel to government employees;

(4) Procedures for selecting private counsel when a prospective client expresses no preference;

(5) Action to be taken in the event Congress disallows pending requests for private counsel funding.

Recommendations resulting from an examination of the foregoing areas include:

(1) Solicitation of advisory opinions from the ABA on the ethical difficulties, if any, in continuing to pursue several forms of direct Department representation that do not involve retaining private counsel;

(2) Implementation of one or more limitations upon retained counsel to control and, hopefully, reduce the amount of private counsel bills;

(3) The introduction of legislation amending the Federal Tort Claims Act to permit substitution of the United States as a party-defendant;

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(4) Alterations in the procedures for selecting private counsel, including advertising and the establishment of criteria and a selection committee;

(5) A re-drafting of the Attorney General's January 31, 1977 representation guidelines to specifically include additional standards;

(6) Use of initial client interviews where the potential for conflicts of interest arise.

This study was prepared by the Representation Committee of the General Litigation Section, Civil Division, comprising Dennis G. Linder, Assistant Chief and committee chairman, John T. Boese, Robert J. Franzinger, and R. John Siebert, in consultation with David J. Anderson, Chief, General Litigation Section, Barbara B. O'Malley, Assistant Chief, Jeffrey Axelrad, Chief, Information and Privacy Section, and J. Roger Edgar, Chief, Frauds Section.

## I.

## INTRODUCTION

### 1. The Representation Function of The Department of Justice.

From the Department's earliest days, it has been consistently recognized that for both equitable and prudential

reasons, the Department has an obligation to represent federal employees sued for conduct performed in the lawful exercise of their duties. Over a century ago, Attorney General Jeremiah Black declared:

> When an officer of the United States is sued for doing what he was required to do by law, or by the special orders of the Government, he ought to be defended by the Government. This is required by the plain principles of justice as well as by sound policy. No man of common prudence would enter the public service if he knew that the performance of his duty would render him liable to be plagued to death with lawsuits, which he must carry on at his own expense. For this reason, it has been the uniform practice of the Federal Government, ever since its foundation, to take upon itself the defence of its officers who are sued or prosecuted for executing its laws. [9 OAG 51 (1857)].

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(p. 113) The statutory basis for the Department's authority to represent the interests of the Government's employees, and thus those of the Government itself, derives from the Judiciary Act of 1789 which established the Office of Attorney General and provided for the creation of United States Attorneys who would be empowered to litigate "civil actions in which the United States shall be concerned," 1 Stat. 92, Ch. 20 § 35 (1789). Today, this same authority may be found in Section 516 of Title 28, United States Code, which provides that the conduct of litigation in which the United States "is interested", is "reserved to officers of the Department of Justice, under the direction of the Attorney General."

Recognition of the Department's moral and statutory obligation to represent federal employees in litigation challenging the propriety of their authorized conduct has been noted by other departments and branches of the Government. Early in this century, the Assistant Comptroller to the Secretary of War stated:

> That the Government should sustain its officers and employees in the discharge of their duties and defend them when attacked in the courts for alleged injuries growing out of the performance of those duties has been repeatedly affirmed. (Citations omitted.) 15 Comp. Dec. 621 (1909).

More recently in *Barr v. Matteo,* 360 U.S. 564, 591 (1959), Mr. Justice Brennan, arguing in dissent for a narrowing of the immunity defense available to government employees sued for money damages, pointed out that "[p]ursuant to an Act of Congress, the inconvenience to the government officials made defendants in these suits has been alleviated through the participation of the Department of Jus-

tice." Indeed, the same rationale for providing Departmental representation to Government employees, *i.e.*, sustaining employee morale and promoting the unhampered and vigorous exercise of job responsibilities, has been used by the courts to support its rule of official immunity, versions of which serve to protect from civil liability members of the Legislative, Judicial, and Executive Branches. As articulated by Judge Learned Hand,

> . . . it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all (p. 114) officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.*

2. *Source Of Present Problems: Changes In The Immunity Defense.*

Until recently, there was rarely, if ever, any need for Department of Justice attorneys representing individuals in damage actions to involve themselves to any great extent in the facts of a particular case. The defense of absolute immunity, based upon a showing that the defendant official was acting within the outer perimeter of his duties, could be asserted without such involvement. The law of absolute immunity, however, which had earlier offered a general insulation to government personnel from individual adverse monetary judgments, has recently been moving toward a less protective stance, thereby undercut-

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* *Gregoire v. Biddle*, 177 F.2d 579, 581 (2nd Cir. 1949), *cert. denied*, 339 U.S. 949 (cited with approval in *Barr, supra* at 571-572).

ting the availability of such protection. As a corollary to the erosion of the defense, Department attorneys are now being required, with increasing frequency, to involve themselves more deeply with the factual aspects of a case, which may occasionally involve allegations of criminal activity. As a result, Department attorneys have been assuming a representational role more akin to that traditionally played by private counsel in the sense that it is the interests of the individually-sued government employees which have become a major focus of the litigation for the Department attorney. The defense of such actions by Department attorneys, particularly those which may involve possible criminal activity, are very likely to collide with the broader mandates of the Department in the areas of law enforcement, criminal prosecution, and the general vindication of government lawmaking, its implementation, and application.

3. *The Current Status Of Representational Problems.*

The Department of Justice has traditionally represented federal officials and employees in a wide range of litigation, examples of which include (1) suits against members of the (p. 115) Legislative Branch (*McSurely v. McClellan,* 521 F.2d 1024 (C.A.D.C. 1975)); (2) suits against federal judges (*Garfield v. Palmieri,* 297 F.2d 526 (C.A. 2 1962)); (3) issuance of a press release (*Barr v. Matteo, supra*); (4) institution of administrative proceedings (*Economou v. U.S. Dept. of Agriculture,* 535 F.2d 688 (C.A. 2 1976), cert. granted, — U.S. L.W. —; (5) medical treatment by a military doctor (*Henderson v. Bluemink,* 511 F.2d 399 (C.A.D.C. 1974); (6) sending notices

of tax levies (*David v. Cohen,* 407 F.2d 1268 (CADC 1969)); (7) the sending of a letter expressing views as to a company's capabilities (*Expeditions Unlimited v. Smithsonian Institution, et al.,* — F.2d — (CADC June 28, 1976) pending on rehearing *en banc*; and (8) activities of federal law enforcement and intelligence collection agencies brought against government employes (See Appendix A for examples).

A. *Existing Conflicts.*

As a result of the unprecedented disclosures in recent years of apparent misconduct by government officials, and the aforementioned decrease in the availability of absolute immunity, there has been a burgeoning growth of personal damage actions against current and former federal employees. As might be expected, this litigation has brought the Department a steadily increasing number of requests from the sued employees for direct Departmental representation in both their official and individual capacities.* At present, approximately nine cases handled by the General Litigation Section raise serious representational problems due to two recurrent situations: (1) material conflicts or inconsistencies in the recollections of pertinent facts among individually sued government defendants (hereinafter referred to as "inter-defendant conflicts"), and (2) allegations of conduct on the part of the individual government defendants which are also the sub-

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* The Department has always represented all government employees sued in their official capacities as mandated by its statutory responsibility under 28 U.S.C. § 516.

ject of pending federal criminal investigations being undertaken by the Civil Rights and the Criminal Divisions.**

(p. 146) Secretary of State
Henry A. Kissinger
Richard G. Kleindienst
Richard Helms
Charles N. Colson
John W. Dean, III
L. Patrick Gray, III
Egil Krogh, Jr.
Robert C. Mardian
Richard M. Nixon
H.R. Haldeman
John D. Ehrlichman
Jeb Stuart Magruder
Herbert W. Kalmbach
David R. Young
John J. Caulfield
Anthony T. Vlasewicz
E. Howard Hunt
G. Gordon Liddy
James W. McCord, Jr.

This is an action filed in September 1976 by columnist Jack Anderson against the heads of four Federal agencies and the FBI, as well as twenty individual defendants associated with the Nixon Administration for alleged deprivation of the plaintiff's constitutional rights to freedom of the press, privacy, and freedom from warrantless

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** The pertinent criminal investigations include the CIA mail opening investigation conducted by the Criminal Division and now concluded with a decision by the Attorney General not to prosecute; the FBI break-in investigation conducted by the Civil Rights Division and still in progress; and the examination of NSA electronic interception of international communications conducted by the Criminal Division, also still pending.

searches and seizures. A variety of improper conduct is alleged, including harassment and unlawful physical and electronic surveillance.

Five defendants are sued in their official capacities, and the Department will, of course, represent them directly. The remaining defendants are sued individually. It is too early to predict with any certainty how many private counsel will be needed. To date, one attorney has been retained to represent former Attorney General Mitchell, and the Department has offered to retain another attorney to represent former President Nixon, Mr. Haldeman and Mr. Ehrlichman. The face of the complaint suggests that inter-defendant conflicts may arise in the course of the litigations. If the individual defendants should request our representation, and if they should be in conflict regarding the plaintiff's allegations, then, based upon current Department policy, consideration would be given to retaining private counsel.

(p. 1118) Exhibit 80: Staats Letter of May 8, 1978, Regarding Request for Further Clarification of Comptroller General's Decision of April 12, 1978 (Exhibit 37)[1]

Comptroller General of the United States
Washington, D.C. 20548

May 8, 1978

The Honorable James Abourezk
Chairman, Subcommittee on Administrative Practice and Procedure
Committee on the Judiciary
United States Senate

Dear Mr. Chairman:

This is in response to your letter of April 27, 1978, in which you seek further clarification of our opinion, B-130441, April 12, 1978, concerning the authority of the Department of Justice to retain unsupervised private counsel to represent Government employees in civil suits brought against them in their individual capacities.

You state your view that the legislative history of 28 U.S.C. §§ 515(b) and 543 shows that whenever the Attorney General is protecting the interests of the United States within the meaning of 28 U.S.C. §§ 516-517, by hiring private counsel, Congress intended that such hiring must be in compliance with the requirements of sections 515(b) and 543. You then reason that because we hold that the requirements of sections 515(b) and 543 need not be followed in cases involving Government employees sued in their individual capacities, (arising out of conduct per-

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[1]See exhibit 76 for analysis of April 12, 1978, decision and this letter.

formed within the scope of their employment) that it is our position that no "516-517 interest" is involved in such cases. Based upon this belief, you raise several legal arguments and questions and ask that we "clarify" our position by responding to them.

Alternatively, in the event your understanding of our Opinion is not accurate (and we have found that the "interest" involved in these suits can be classified as a section 516-517 interest), you request that we explain the basis for the Attorney General's authority to retain independent private counsel in light of certain provisions of sections 516 and 517 and section 17 of the Judicial Department Act as you construe them, and in light of your view of an explanation by our Deputy General Counsel Mr. Milton Socolar "that GAO had found no such authority to exist."

We do not hold that the "interest" involved in the suits at issue cannot be classified as a "section 516-517 interest." It is our view, as stated on page 3 of our April 12 opinion, that the United States *is* interested within the meaning of 28 U.S.C. §§ 516 and 517 in suits brought against Government employees in their individual capacities resulting from conduct performed within the scope of their employment. (See also page 2 of our explanatory letter of April 24, 1978, to you.)

(p. 1119) However, we do not agree with your interpretation of the legislative history of sections 515(b) and 543. Our interpretation, as explained as pages 3 and 4 of the Opinion, is that the mandates of sections 515(b) and

543 were not designed to apply in cases where a Federal employee is sued in his individual capacity under the circumstances described in the Attorney General's Order. Thus, those sections do not bar the Attorney General from hiring counsel without regard to procedures specified therein.

Because it is our view that the interest involved in the suits in question "can be 'classified' as a section 516-517 interest," it is unnecessary to answer questions two and four of your letter since they are predicated upon the understanding that we held to the contrary. In answer to questions one and three, there is no specific statutory authority to hire unsupervised outside counsel to represent employees under the circumstances described in the Attorney General's Order. However, sections 516 and 517 do authorize use of Department appropriations to protect an interest of the United States. One such interest is the representation of Federal employees under these circumstances.

It is a settled rule that, where an appropriation is made for a particular object, it is also available for expenses which are necessary or incident to the proper execution of the object, unless there is another appropriation which makes more specific provision for such expenditures, or unless they are prohibited by law. 50 Comp. Gen. 534; 38 *id.* 782; 27 *id.* 419. Under the conflict of interest circumstances enumerated in the Attorney General's Order, the only means for him to fulfill his duty under sections 516 and 517 to protect the interests of the United States is to retain private counsel who are *not* under his supervvision, since use of Department officers—specially retained or otherwise—would violate the judicial canon of

ethics. Since in light of their underlying purpose we do not view sections 515(b) and 543 as prohibiting such expenditures, in the limited circumstances at issue, we see no basis upon which to object to the Attorney General's policy.

In the final analysis, the difference between us lies in the approach taken with regard to an apparent dilemma inherent in applying the statutes involved to the situations covered by the Attorney General's policy.

There is no question but that the Department of Justice is authorized to pursue the interests of the United States in matters of litigation. And, as the courts have stated, providing legal counsel for employees in the cases under consideration serves a (p. 1120) legitimate United States interest. The apparent dilemma is caused by those statutes which by their terms provide for legal counsel to be under oath to the United States, while here the very reason for going to outside counsel is because of the conflict inherent in the assignment of counsel sworn to the United States to represent the individuals involved.

As we understand your position, you would conclude that the Department has only one option — that is, to forego pursuit of these legitimate interests of the United States. It is our opinion, however, that the statutes were not intended to make it inappropriate for the Department of Justice to pursue such interests. In other words, given the special circumstances of representing employees in conflict situations, we believe that the fundamental statutory authority of the Department to attend to the litigative interests of the United States is apart from the statutory provisions regarding use of Department attorneys which

were enacted in the context of suits to which the United States is a party.

I hope this has accomplished the clarification which you seek.

Sincerely yours,

/s/ Elmer B. Staats
Comptroller General
of the United States